

THE CHANCELLOR AS MINISTER OF ADMINISTRATIVE JUSTICE

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SUMMARY — The Code's understanding of *notarius* is similar to the Italian usage of *notaio* as a person trained and authorized to draft legal instruments. Since the *Code of Canon Law* was drafted and is based on a more European concept of a code of civil law, the concept of notaries in the Code does not follow the common law tradition, where a notary merely authenticates documents. Instead it follows the civil law tradition, where notaries often prepare legal documents as well. As secretary of the curia, therefore, the notary's functions of preparing and publishing curial documents are especially entrusted to the chancellor. The implication for the North American ecclesial context is that the diocesan chancellor, as a "notary," should be trained in canon law or civil law, but preferably both. As the chief legal officer in the diocese, the chancellor acts as a sort of "state secretary," that is, a public minister whose official task is the authentic redaction of acts which have public legal effect. In particular, as chief canonical advisor for the executive branch of governance, the chancellor should have a special solicitude for the ministry of administrative justice.

RÉSUMÉ — La compréhension du Code de *notarius* est similaire à l'utilisation italienne de *notaio* comme une personne formée et autorisée à élaborer des instruments juridiques. Étant donné que le *Code de droit canonique* a été rédigé et est basé sur un concept plus européen d'un code de droit civil, la notion de notaires dans le Code ne suit pas la tradition de droit commun, où un notaire authentifie simplement les documents. Au contraire, le Code suit la tradition de droit civil, où les notaires préparent souvent des documents juridiques. Par conséquent, en tant que secrétaire de la curie, les fonctions du notaire de préparer et de publier des documents curiales sont spécialement confiées au chancelier. Cela n'est pas sans implication dans le contexte ecclésial nord-américain. Le chancelier diocésain, comme « notaire », devrait être formé en droit canonique ou en droit civil mais de

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préférence les deux. À l'instar du principal conseiller juridique du diocèse, le chancelier agit en « secrétaire d'État », qui est, un ministre public dont la mission officielle est la rédaction authentique des actes qui ont un effet juridique public. En particulier, en tant que conseiller canonique en chef de la branche exécutive du gouvernement, le chancelier doit avoir une sollicitude particulière pour le ministère de la justice administrative.

Introduction

In March of 1992, Cardinal Joseph Bernardin, then Archbishop of Chicago, appointed me to serve as chancellor of the Archdiocese of Chicago, which it was my privilege to do for eight years, continuing under Cardinal Francis George after Cardinal Bernardin's death in November 1996 until the end of my second term on June 30, 2000. As chancellor, I served as chief canonical officer in relation to the exercise of the archbishop's executive power of governance.

During my years as chancellor and subsequently as auxiliary bishop of Chicago from 2003 to 2010 and as Bishop of Springfield in Illinois from 2010 until the present, I have met many diocesan chancellors with various job descriptions. My own successor as chancellor was a layman who did not have a canon law or civil law degree, but he directed the administration of the archdiocesan curia. Other chancellors' job descriptions have ranged from archivist to directing pastoral planning to in-house civil legal counsel. In some cases, it seems the title "chancellor" was given to provide a loftier designation for an administrative assistant.

In his doctoral dissertation, "The Diocesan Chancellor in Canon Law and in Praxis in United States Archdioceses," Monsignor Gerard Measure, now the Chancellor of the Archdiocese of Philadelphia, surveyed the thirty-two archdioceses in the United States in 1996, to which all of the chancellors responded.¹ He reported that, beyond the roles of notary and archivist (which usually involved supervising the work of a professional archivist), "all of them have additional responsibilities. There is a considerable degree of variety in these areas of responsibility. Several, for example, are vicars. Many have been delegated the power to grant marriage dispensations or faculties. Also, many are involved in financial matters, clergy matters, legal matters, coordinating the curia, advising the archbishop, and some do work in communications."²

¹ Gerard Christopher MEASURE, *The Diocesan Chancellor in Canon Law and in Praxis in United States Archdioceses*, J.C.D. thesis, Washington, The Catholic University of America, 1997, 195.

² *Ibid.*, 206.

Due to the wide divergence of understanding and description of this office from one diocese to another, a closer examination of the definition of the role of the chancellor is necessary. The variety of responsibilities in the job descriptions of chancellors is explained by the unique provision in the *Code of Canon Law* describing the “principal task” of the chancellor in terms of the functions of an archivist “unless particular law determines otherwise.”³ Although this provision appears to give great latitude for particular law to define the tasks of the chancellor, it would be a misapplication of the law to interpret this possibility in a way that misconstrues the basic role of the chancellor as an archivist and notary. Another source of misunderstanding is the Code’s seemingly unambiguous statement that the “chancellor and vice-chancellor are automatically notaries and secretaries of the curia.”⁴

1 — *Notary as Understood in Common Law and Civil Law Systems*

It is misleading and incorrect simply to equate the Latin word *notarius* with the Anglo-American notion of “notary public.” For example, Illinois law indicates that the “terms ‘notary public’ and ‘notary’ are used interchangeably to mean any individual appointed and commissioned to perform notarial acts.”⁵ In turn, a “notarial act” is defined as including “taking an acknowledgment, administering an oath or affirmation, taking a verification upon oath or affirmation, and witnessing or attesting a signature.”⁶

The principal duty of a notary public in performing these notarial acts is to “determine, either from personal knowledge or satisfactory evidence, that the signature is that of the person” executing an instrument, making an oath or affirmation, or signing a document.⁷ Any United States citizen or lawful permanent resident who can read and write the English language, has resided in the State of Illinois for thirty days preceding the application or has been a resident of a state bordering Illinois who has worked or maintained a business in Illinois for thirty days preceding the application, has never been the holder of a notary public appointment that was revoked or suspended during the past ten years, and has not been convicted of a felony crime, can become a notary public simply by sending a completed application form and \$10 to

³ Canon 482, § 1.

⁴ Canon 482, § 3.

⁵ *Illinois Notary Public Act, Illinois Compiled Statutes*, 5 ILCS 312/1-104(a) (1986).

⁶ *Ibid.*, 5 ILCS 312/6-101(a) (1986).

⁷ *Ibid.*, 5 ILCS 312/2-102 (amended 2016).

the Illinois Secretary of State or \$5 if the applicant appears before the county clerk in person.⁸

This description of a notary public in Anglo-American law is quite different from the understanding of a notary in Latin American and continental legal systems. Italy provides a fitting example.

The Italian *notaio* drafts and authenticates important legal instruments, including wills, corporate charters, conveyances and contracts.... [N]otaries are trained and experienced draftsmen. Notaries are also authorized to draft and present in court certain petitions in noncontentious matters. Frequently they are appointed by court order to take inventories, to draw up partition plans, to take custody of sequestered property, and to perform other duties in connection with litigation.⁹

The process of becoming a *notaio* in Italy is also much more demanding and selective than that of a notary public in the United States.

Successful completion of a difficult national examination is a requirement for admission to the *notariat*. Before taking the examination, the candidate must have completed law school and have served a two-year apprenticeship

⁸ Ibid., 5 ILCS 312/2-106 (amended 2000).

⁹ Mauro CAPPELLETTI, John Henry MERRYMAN, and Joseph M. PERILLO, *The Italian Legal System*, Stanford, California, Stanford University Press, 1967, 99-100.

The Italian system of notaries is considered to be of the “latino” type, rather than the Anglo-Saxon: “L’ordinamento del notariato nel nostro Paese è di quelli cosiddetti di tipo latino, perché vigente nella maggior parte degli Stati il cui diritto più immediatamente deriva ed è stato modellato sugli schemi a sui concetti del diritto romano a bizantino: è un ordinamento che diverge pertanto da quelli di altre nazioni, soprattutto di diritto anglosassone.... [L]e legislazioni sul notariato si distinguono, sostanzialmente, a seconda che non riconoscono particolare importanza al notaio e all’atto pubblico (Inghilterra, Danimarca, Stati Uniti) ovvero affidino la funzione notarile a taluni magistrati (Svezia), ovvero ancora regolino il notaio come un privato cui lo Stato delega il potere certificante (notariato cosiddetto latino).” Marcello DI FABIO, “Notaio,” *Enciclopedia del Diritto*, Milan, Cuius, 1978, vol. 28, p. 568. The term “notary” has had various meanings over the centuries, at one time indicating the assistant or minister of the emperor, the pope or a prince, then the chancellor of a tribunal, until finally its present form as a legal professional: “Per un lungo tempo la parola ‘notaro’ conservò così un significato generico ed oscillante, indicando ora l’assistente, il ministro dell’Imperatore, del Papa o di un principe, ora l’attuario o cancelliere del tribunale, ora infine il professionista che presta l’opera sua ai privati, ricevendone le convenzioni in forma solenne e conservandole in perpetuo.” DI FABIO, “Notaio,” 567. The First International Congress of Latino Notaries passed a resolution at their meeting in Buenos Aires in 1948 defining the notary as a technician of the law, charged with a public function, consisting in receiving and interpreting the wishes of the parties, giving them a legal form, and drafting legal documents accordingly, thereby conferring authority on them: “Il notaio è un tecnico del diritto, incaricato di una funzione pubblica, consistente nel ricevere ed interpretare la volontà delle parti, darvi una forma legale, redigere le scritture idonee a tal fine, conferire autorità alle stesse.” DI FABIO, “Notaio,” 569.

in the office of a notary. When a vacancy occurs in one of the approximately 4,000 notarial positions, preference is given to notaries already in service. In the ensuing national competition for the position, such factors as seniority, publications, and public service are evaluated.¹⁰

Far more than a person who simply verifies signatures and the authenticity of documents, the Italian *notaio* “is compared to the judge in the impartiality he must exercise and the faith accorded his acts.”¹¹ This understanding of *notaio* in Italian law has clear historical antecedents. In his scholarly tome, *The Medieval Origins of the Legal Profession: Canonists, Civilians and Courts*, James A. Brundage wrote:

A notary was not necessarily a lowly ink-stained scribe. Many individuals who bore the title of notary were highly-educated, well-connected men of power and influence who functioned as administrative officials and advisors to their masters.... Papal notaries in particular had been important curial officers since very early times and continued to play significant roles in twelfth-century papal administration. Thus, for example, one of the legates who Alexander III sent in 1169 to negotiate with King Henry II and Archbishop Thomas Becket concerning the conditions for Becket’s return to Canterbury was a papal Notary named Gratianus.¹²

Professor Brundage also noted an important development in the distinction of the role of a notary and that of a notary public.

A fundamental transformation of the notary’s role took place during the second half of the twelfth century, beginning in the towns of northern Italy. Although notaries prior to that time often drafted charters, contracts, testaments, and important public and private documents, the authority of those documents rested on the signatures or seals of witnesses who warranted that they were authentic. The term “notary public” (*publicus tabellio*, *notarius publicus*, *scriptor publicus*) became current in Italy from around 1140 and by the end of the century had passed into general use. The spread in the use of public notaries seems to have been tied to the increasing frequency with which bishops committed the handling of most of their routine jurisdictional business to officials-principal.

The notary public, in contrast to the plain notary or scribe, was a public official in the sense that he held a commission from a high-ranking public authority, such as the emperor or the pope. The notary’s commission empowered him to produce reliable documents and assured judges that they could presume that the instruments he produced were accurate and authentic

¹⁰ CAPPELLETTI, MERRYMAN, and PERILLO, *The Italian Legal System*, 100-101. See also DI FABIO, “Notaio,” 578.

¹¹ CAPPELLETTI, MERRYMAN, and PERILLO, *The Italian Legal System*, 102; n. 70.

¹² James A. BRUNDAGE, *The Medieval Origins of the Legal Profession: Canonists, Civilians and Courts*, Chicago, The University of Chicago Press, 2008, 211-212.

so long as they bore his signed attestation and his personal identifying sign or emblem.¹³

In contrast to the *notaio*'s exercise of technical skills as a trained lawyer, an American notary public who is not also an attorney (independent of the fact of being a notary) is not authorized "to prepare any legal instrument, or fill in the blanks of an instrument, other than a notary certificate."¹⁴ Because of these differences, the Illinois Notary Public Act contains the following provision:

Every notary public who is not an attorney who advertises the services of a notary public in a language other than English, whether by radio, television, signs, pamphlets, newspapers, or other written communication, with the exception of a single desk plaque, shall include in the document, advertisement, stationery, letterhead, business card, or other comparable written material the following: notice in English and the language in which the written communication appears. This notice shall be of a conspicuous size, if in writing, and shall state: "I AM NOT AN ATTORNEY LICENSED TO PRACTICE LAW IN ILLINOIS AND MAY NOT GIVE LEGAL ADVICE OR ACCEPT FEES FOR LEGAL ADVICE." If such advertisement is by radio or television, the statement may be modified but must include substantially the same message.

A notary public shall not, in any document, advertisement, stationery, letterhead, business card, or other comparable written material describing the role of the notary public, literally translate from English into another language terms or titles including, but not limited to, notary public, notary, licensed attorney, lawyer, or any other term that implies the person is an attorney. To illustrate, the word "notario" is prohibited under this provision.¹⁵

This law was passed in 1985, became effective July 1, 1986, and was amended in 2004 (to include electronic communications) in response to abuses primarily in Hispanic cities where non-attorney notaries public were using Spanish advertisements to offer the services of a *notario publico*. Unsuspecting clients who assumed that a *notario publico* was a licensed attorney in the States as in Mexico would then pay exorbitant fees expecting to receive legal services, usually petitions for immigration, only to find that the notary would do no more than authenticate their documents.¹⁶

¹³ Ibid., 212.

¹⁴ *Illinois Notary Public Act, Illinois Compiled Statutes*, 5 ILCS 312/6-104(h) (1986).

¹⁵ Ibid., 5 ILCS 312/3-103(a) (amended 2004).

¹⁶ Thus, a further proscription of the law states: "No notary public, agency or any other person who is not an attorney shall represent, hold themselves out or advertise that they are experts on immigration matters unless they are a designated entity as defined pursuant to Section

Conversely, if there are hazards in a literal translation of the English term “notary public” into a foreign language, care must be taken to avoid a literal or simplistic translation when the *Code of Canon Law* uses the Latin term *notarius* without regard as to the true meaning of the word or phrase in the language from which it is being translated. Accordingly, it is necessary to take a closer look at the canonical definition of the duties of a notary.

Canon 484 – The duties of notaries are:

- 1° to write the acts and instruments relating to decrees, dispositions, obligations and other tasks required of them;
- 2° to record faithfully in writing what has taken place and sign the record with a notation of the place, day, month and year;
- 3° with due consideration of all requirements, to furnish acts or instruments to one legitimately requesting them from the files and to declare copies of them to be in conformity with the original.

In the first subparagraph, the Latin word *conscribere* denotes more than just writing down someone else’s words but means rather “to put together in writing, to draw up, compose.” This indicates that the Code’s understanding of *notarius* is similar to the Italian usage of *notaio* as a person trained and authorized to draft legal instruments.¹⁷ It must be remembered that the *Code of Canon Law* was drafted and is based on a more European concept of a code of civil law. Thus, “the concept of notaries in the code does not follow the common law tradition, where a notary merely authenticates documents. Instead it follows the civil law tradition, where notaries often prepare legal documents as well. As secretary of the curia, therefore, the notary’s functions of preparing and publishing curial documents are especially entrusted to the chancellor.”¹⁸

2 — Implication of the Chancellor as Notary

The implication for the North American ecclesial context is that the diocesan chancellor, as a “notary,” should be trained in canon law or civil law, but preferably both. As the chief legal officer in the diocese, the chancellor

245a.1 of Part 245a of the Code of Federal Regulations (8 CFR 245a.1) or an entity accredited by the Board of Immigration Appeals.” *Notary Public Act, Illinois Revised Statutes*, chapter 102, § 203, 103(c) (1987).

¹⁷ LEWIS and SHORT, *A Latin Dictionary*, s.v. *conscribo*. Even in English, the nature of “conscription” as a function of drafting written instruments can be seen in the usage of the term “conscript” to refer to a person who is forcibly enlisted, enrolled or “drafted” into military service.

¹⁸ MESURE, *The Diocesan Chancellor in Canon Law and in Praxis*, 100.

acts as a sort of “state secretary,” that is, a public minister whose official task is the authentic redaction of acts which have public legal effect. In particular, as chief canonical advisor for the executive branch of governance, the chancellor should have a special solicitude for the ministry of administrative justice.

Since an important aspect of the diocesan bishop’s responsibility for executive power of governance includes handling complaints and petitions for hierarchic or administrative recourse, given the chancellor’s special solicitude for the ministry of administrative justice, it would be appropriate for the chancellor to be named episcopal vicar for administrative recourse, or be given delegated powers to adjudicate cases of administrative recourse.¹⁹ A possible alternative is simply to include responsibility for administrative justice in the chancellor’s description of duties, since the Code allows particular law to determine the principal task of the chancellor.²⁰ The late canonist James Provost commented on this canon: “Indeed, the code foresees the possibility of particular law providing for different responsibilities in the office of the chancellor itself (c. 482, § 1). The current American practice could be regularized in this way, expanding the nature of the office so that it also entails the exercise of executive power of governance.”²¹

In this way, respecting the principle of subsidiarity, local deans and regional episcopal vicars could handle disputes of a general pastoral nature, diocesan agencies could deal with those pertaining to a more specific pastoral question, and the chancellor could be the competent person to adjudicate

¹⁹ If the chancellor is given competence for cases of administrative recourse, it would be suitable that the chancellor be a priest, inasmuch as canon 483, § 2 requires that a priest must be the notary in cases in which the reputation of a priest can be called into question. Moreover, if the chancellor is named an episcopal vicar, the chancellor would have to be a priest, since only priests can be episcopal vicars (c. 478, § 1).

²⁰ Canon 482, § 1.

²¹ James H. PROVOST, “Canonical Reflection on Selected Issues in Diocesan Governance,” in James K. MALLETT (ed.), *The Ministry of Governance*, Washington, D.C., CLSA, 1986, 232. The following opinion, however, stands in contrast: “On the other hand, it would be less appropriate to make use of the diocesan chancellor [for granting matrimonial dispensations], as used to be done in some countries in the past, when the figure of the episcopal vicar ‘for a certain type of business’ did not exist in the law. In fact the chancellor, whether or not a cleric, does not share in the power of governance “*vi officii*”; his functions are fundamentally those of a notary or secretary of the curia (cf. c. 482). And particular law could not change the nature of such an ecclesiastical office.” Julián HERRANZ CASADO, “The Personal Power of Governance of the Diocesan Bishop,” Address of the Secretary of the Pontifical Council for the Authentic Interpretation of the Code of Canon Law, given at the Annual Convention of the Canon Law Society of America, Nashville, Tennessee, October 15, 1987, in *Comm*, 20 (1988), 308-309. This objection could be overcome, however, by way of delegation or by naming the chancellor an episcopal vicar for administrative recourse.

conflicts which involve more technical or complex questions of canon or civil law. The chancellor may also be designated as the bishop's delegate to hear appeals of cases from the local deans or the diocesan agencies.

3 — *Historical Praxis of the Role of the Chancellor*

The American practice of the diocesan chancellor stems from particular legislation in the nineteenth century. The First Plenary Council of American bishops in 1852 decreed that "each bishop should appoint a chancellor 'for the easier administration of ecclesiastical affairs, and for achieving a stable norm of acting in those matters.' While in theory the chancellor was only the archivist and keeper of records, he would subsequently become of greater significance in American dioceses."²² In 1866, the Second Plenary Council "repeated the decree of the First Plenary Council urging each bishop to appoint a chancellor. It also described the office of vicar general: he was to have precedence over the rest of the clergy, but could not exercise the extraordinary faculties delegated to him by the bishop unless the bishop were absent for an entire day. In subsequent practice, the vicar general became largely honorific while the chancellor became the actual delegate of the bishop."²³

Furthermore, in 1964 Pope Paul VI specifically granted local ordinaries in the United States the power to delegate to chancellors the faculties for functions otherwise exercised by a vicar general.²⁴ In contrast, the European experience of diocesan chancellors is diverse. A questionnaire sent to sixty different episcopal curias in 1984 inquired:

What is the function of the chancellor in your administration? ... The answers to this question vary considerably. Many European curias do not have a "chancellor."... In Germany and France, the title "chancellor" is not used; instead, reference is usually made to a "general secretary of the curia."...

An answer often reported was a combination of vicar general and chancellor. The administration of the curia as a rule is presided over by the vicar general when neither a chancellor or a general secretary is mentioned....

²² Gerald P. FOGARTY, S.J., "Diocesan Structure and Governance in the United States," in MALLETT (ed.), *The Ministry of Governance*, 31; quoting *Collectio Lacensis*, 3:146.

²³ *Ibid.*, 33-34; citing *Concilii Plenarii Baltimorensis II. In Ecclesia Metropolitana Baltimorensi, 7-21 Octobris 1866. Habiti et a Sede Apostolica Recogniti Acta et Decreta*, 2nd ed., Baltimore, John Murphy, 1894, 54-55, nos. 71-71. See also John Edward PRINCE, *The Diocesan Chancellor: An Historical Synopsis and Commentary*, Canon Law Studies, 167, Washington, D.C., The Catholic University of America Press, 1942, 38-39.

²⁴ *CLD*, vol. 6, 385; citing a letter of the U.S. Apostolic Delegate, December 3, 1964, Prot. No. 189/42.

Most dioceses answered that the chancellor does have a specific function. This means that in the majority of those dioceses which have a chancellor, this office has been given additional powers over and above those specified in the code; e.g. diocesan financial administrator, or episcopal vicar responsible for diocesan property, director of personnel (*Personalchef*), archivist, or “episcopal vicar with special duties.” Most chancellors entrusted with additional duties exercise these in the field of administration, finance, or organization.²⁵

The practice and understanding of the office of the chancellor in the United States conforms to the tradition of the chancellor’s equitable jurisdiction found in Anglo-American law. The classic description of the development of the role of the chancellor and courts of equity in England comes from Maitland, who wrote that, at the end of the thirteenth century, during the reign of King Edward I, there were three great courts: the King’s Bench, the Common Bench or Court of Common Pleas, and the Exchequer. One of these courts, the Exchequer, was not only a court of law but an administrative or executive office of government; the modern English treasury is a descendant of the former Exchequer. Two great offices or departments transacted what is known today as the “civil service” of the country, i.e. the Exchequer, which was the fiscal department, and the Chancery, which was the secretarial department. The king’s permanent Council stood above these. The chief executive officer of the Chancery was known as the chancellor, who was usually a bishop. Maitland described the chancellor as the “King’s secretary of state for all departments.” He kept the great seal and supervised the already large volume of writing that needed to be done in the King’s name.

The chancellor was not a judge initially, but much of his work brought him into close contact with the administration of justice. For example, he directed a large staff of clerks who drafted and issued the writs which introduced actions in the courts of law and which were required to bear the king’s great seal. Many of these writs were formulated long ago, but the Chancery enjoyed a certain limited power to create new writs to fit new cases as they arose.

In another way, the chancellor had an even closer connection with the administration of justice. Although the courts of law were already in existence, the king still retained a reserved jurisdiction over certain matters of justice. Persons who could not obtain relief in the law courts presented their petitions to the king and his council requesting some remedy. By the end of the thirteenth century, the annual number of such petitions had already become quite large, requiring a great deal of work to read and consider them. The vast portion of

²⁵ Roland-Bernhard TRAUFFER, O.P., “Diocesan Governance in European Dioceses following the 1983 Code: An Initial Inquiry,” in MALLET (ed.), *The Ministry of Governance*, 197-198.

this responsibility rested on the chancellor. He acted as the king's prime minister and was considered the most learned member of the council. The judicial powers of the chancellor began to unfold in dealing with these petitions.

Usually the petitioners in these cases needed some kind of relief from another person. Complaining that for some reason or another they could not get a remedy in the ordinary courts of law, the petitioners claimed that they were still entitled to a remedy as a matter of justice. For example, the petitioners would say that they were poor, old or sick, while their adversaries were rich and powerful, would bribe or intimidate jurors, or had acquired an advantage either by some deceit or accident which the ordinary courts could not address because of their formal procedures. The king referred such petitions to the chancellor. By the fourteenth century, petitioners went straight to the chancellor instead of going to the king, addressing their complaints to him and begging him to do "what is right for the love of God and in the way of charity."

During the sixteenth century the rules that the chancellors were administering in their assigned field began to emerge. They were known as "the rules of equity and good conscience." It appears that they did not consider themselves strictly bound by precedent or any written authority but rather decided cases based on their own conceptions of a law of nature. At times they would use some analogy from the common law, and at other times they would borrow some great maxim of jurisprudence from the canonists or the civil lawyers.

The last of the great ecclesiastical chancellors was Cardinal Wolsey, who was succeeded in 1529 by Sir Thomas More, a layman and a lawyer. The jurisprudence of the chancery was becoming established by the second half of the sixteenth century. During the reign of King James I, there was a great dispute between Lord Chancellor Ellesmere and Chief Justice Coke which ultimately determined that the Court of Chancery was to have priority over the courts of law. If the Chancery's maxims about trust and fraud were to be effective, it was imperative that the Chancery should have the power to prevent people from obtaining and executing judgements from the courts of law. The Chancery did not claim to be above the courts of law, but it could prevent petitioners from approaching the courts, whereas the courts could not forbid people from going to the Chancery. By about end of the seventeenth century the equitable jurisdiction of the Chancery became a recognized part of the law. More often than not the keeper of the great seal was a great lawyer.²⁶

²⁶ Cf. Frederic W. MAITLAND, "Equity," in Edward D. RE, *Equity and Equitable Remedies: Cases and Materials*, Mineola, New York, The Foundation Press, University Casebook Series, 1975, 2-10. For a similar summary, see Derek ROEBUCK, "The Rise of Equity and the Court of Chancery," in *The Background of the Common Law*, Oxford, Hong Kong and New York, Oxford University Press, 1988, 73-78.

The English settlers in North America brought this system of law courts and courts of equity with them to the new American colonies, using “common law writs and the Chancellor’s injunctive power as mechanisms for controlling administrative officials.”²⁷ The special province of the courts of chancery was their equitable jurisdiction, particularly regarding questions of rights and duties.²⁸

A movement to merge the law courts and the courts of equity in the United States began in the nineteenth century, leading to the abolition of the distinction between actions at law and suits in equity in the codes of procedure of twenty-two states and territories by 1887, when the movement began to wane. The Illinois Civil Practice Act of 1933²⁹ and the Federal Rules of Civil Procedure of 1938 revived interest in the merger of law and equity by providing for a single form of action applicable to legal and equitable suits. Over twenty states used these Federal Rules as a model in revising their own codes of procedure.³⁰

The complete merger of law and equity, however, has never been fully accomplished. For example, even after the adoption of the Illinois Civil Practice Act of 1933, the Illinois Supreme Court adopted a rule requiring the caption and cover of every complaint to contain the words “at law” or “in chancery.”³¹ Thus, for example, the Circuit Court of Cook County, Illinois, today still has a separate Law Division and a Chancery Division.

²⁷ Stephen G. BREYER and Richard B. STEWART, *Administrative Law and Regulatory Policy*, Boston, Little, Brown and Co, 1979, 21; citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

²⁸ “In the Anglo-American system of jurisprudence ... [equity] has reference to the substantive principles (those defining rights and duties) and remedial devices formerly administered in England by the High Court of Chancery in the exercise of its extraordinary jurisdiction, and in the U.S. by courts of chancery or equity in the exercise of similar powers.” Edward D. RYE, “Equity,” in *New Catholic Encyclopedia*, vol. 5, New York, McGraw Hill Book Co., 1967, 503.

²⁹ “Forms of Action. (1) Neither the names heretofore used to distinguish the different ordinary actions at law, nor any formal requisites heretofore appertaining to the manner of pleading in such actions respectively, are necessary or appropriate, and there shall be no distinctions respecting the manner of pleading between such actions at law and suits in equity, other than those specified in this Act and the rules. This section does not affect in any way the substantial averments of fact necessary to state any cause of action either at law or in equity.” *Illinois Civil Practice Act, Illinois Laws* 1933, 784-836, amended by *Illinois Laws* 1955, 2238, codified in *Illinois Revised Statutes*, chapter 110, § 31 (1963).

³⁰ Cf. Austin Wakeman SCOTT and Robert Brydon KENT, *Cases and Other Materials on Civil Procedure*, Boston and Toronto, Little, Brown and Co., Law School Casebook Series, 1967.

³¹ Cf. Illinois Supreme Court, Rule 132, amended January 4, 2013, at http://www.illinoiscourts.gov/supremecourt/Rules/Art_II/ArtII.htm#132 (June 7, 2016).

In light of the substantial involvement of the Church in the historical development of the office of the chancellor and the system of equity in England, the Anglo-American experience of chancery and equity courts provides a beneficial model for the equitable jurisdiction of diocesan chancellors in their role as ministers of administrative justice.³² As “Keeper of the King’s Conscience,”³³ the Lord Chancellor adjudicated cases “not on the basis of the abstract principles of law, but on the basis of what seemed right, just and equitable.”³⁴

Conclusion

A proper understanding of the historical role of the chancellor and the civil law understanding of “notary,” which the canonical tradition presupposes, helps one to see the connection between the duties of archivist, notary and canonical advisor in the office of the chancellor. In the canonical role as keeper of the episcopal seal and the diocesan archives (cf. c. 482, § 1), the diocesan chancellor does not merely authenticate and store official papers and records but must know and be able to retrieve, interpret and apply the decrees, acts, policies, norms, regulations, instructions and canons of the universal and particular laws of the Church and compose canonical documents accordingly. As authorized by the diocesan bishop, the chancellor can fulfill an aggrieved person’s right to have an impartial decision-maker, and can exercise a true ministry of administrative justice for the vindication and defense of the rights of the Christian faithful in the local church.

³² “Partly because of the literary qualifications of the office, the chancellor was always an ecclesiastic, schooled in the Canon and moral law of the Church. Up to the time of St. Thomas More, the first layman to be lord chancellor, practically all of the chancellors had been ‘churchmen’ or ecclesiastics, many of them of high rank in the Church, such as bishops and cardinals. To the end of Cardinal Wolsey’s chancellorship in 1530, the office had been held by no less than 160 ‘ecclesiastics.’ ... Sir Henry Maine states that the early ecclesiastical chancellors contributed to the Court of Chancery, from the Canon law, many of the principles which lie deepest in its structure.” RE, “Equity, Anglo-American Law of,” 503.

³³ “Since one of the titles of the chancellor was that of Keeper of the King’s Conscience, the court he administered also came to be called a Court of Conscience.” RE, “Equity, Anglo-American Law of,” 503. “The cause why there is a Chancery is for that men’s actions are so divers and infinite that it is impossible to make any general law which may aptly meet with every particular and not fail in some circumstances. The office of the Chancellor is to correct men’s consciences for frauds, breaches of trust, wrongs and oppressions of what nature so ever they be, and to soften and mollify the extremity of the law.” *Earl of Oxford’s Case*, 1 Ch. 1 (1615).

³⁴ Lynn R. BUZZARD and Laurence ECK, *Tell It to the Church: Reconciling out of Court*, Elgin, Illinois, David C. Cook Publishing Co., 1972, 72.

LA RÉFORME DE LA CURIE ROMAINE AU SERVICE DE LA NOUVELLE ÉVANGÉLISATION

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RÉSUMÉ — Depuis le début du pontificat de saint Jean-Paul II, l'accent a été mis sur la nouvelle évangélisation. Cette nouvelle évangélisation a été définie, non pas comme une ré-évangélisation, mais comme une nouvelle évangélisation. Ses deux successeurs, Benoît XVI et François, ont continué à mettre l'accent sur cette nouvelle évangélisation. Comment la réforme de la Curie romaine, proposée par le Pape François et souhaitée par beaucoup, pourrait-elle être au service de cette nouvelle évangélisation ? L'auteur suggère qu'on n'a pas besoin de nouvelles structures ou d'un remaniement des structures existantes, mais plutôt d'un *novus habitus mentis*, en mettant l'accent sur le professionnalisme et le service du Pontife Romain et des Églises particulières. Ou, pour le dire dans les mots du saint Père : « Ce dont nous avons besoin, en particulier à cette époque, ce sont des témoins crédibles qui rendent l'Évangile visible par leur vie et par leurs paroles ». Ceci est également vrai pour la Curie romaine.

SUMMARY — Since the beginning of the pontificate of Saint John Paul II, an emphasis has been put on the new evangelization. This new evangelization was defined, not as a re-evangelization, but as a new evangelization. His two successors, Benedict XVI and Francis, have continued to emphasize this new evangelization. How can the reform of the Roman Curia, proposed by Pope Francis and desired by many, be at the service of this new evangelization? The author suggests that, above all, not new structures or a reshuffle of the existing structures are necessary, but rather a *novus habitus mentis*, with an emphasis on professionalism and service to the Roman Pontiff and the particular Churches. Or, to put it in the words of Pope Francis: "What we especially need in these times are credible witnesses who make the Gos-

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pel visible by their lives as well as by their words.” Such is also true for the Roman Curia.

Introduction

Dans sa lettre apostolique *Novo millennio ineunte* au terme du grand jubilé de l’an 2000, Jean-Paul II écrivait :

À maintes reprises, j’ai répété ces dernières années l’appel à la *nouvelle évangélisation*. Je le reprends maintenant, surtout pour montrer qu’il faut raviver en nous l’élan des origines, en nous laissant pénétrer de l’ardeur de la prédication apostolique qui a suivi la Pentecôte. Nous devons revivre en nous le sentiment enflammé de Paul qui s’exclamait : « Malheur à moi si je n’annonçais pas l’Évangile ! » (*1 Co* 9,16)¹.

Comme Jean-Paul II le rappelait dans cette lettre apostolique, il avait déjà souvent parlé de la nouvelle évangélisation. Mais c’est quoi alors, cette nouvelle évangélisation ? Et comment cette nouvelle évangélisation est-elle encore nouvelle, si nous en avons parlé pendant plus de trente ans ? Est-il possible que le projet de réforme de la Curie romaine soit au service de cette nouvelle évangélisation et, si oui, comment ?

1 — La nouvelle évangélisation

L’expression « la nouvelle évangélisation » ne fut pas utilisée par Paul VI dans son exhortation apostolique *Evangelii nuntiandi*² : Paul VI ne parle que de « l’évangélisation », et les mots « nouvelle » et « évangélisation » ne sont utilisés ensemble que dans un contexte différent, c’est-à-dire quand Paul VI écrivait sur « des temps nouveaux d’évangélisation »³. L’évangélisation y est

¹ JEAN-PAUL II, lettre apostolique *Novo millennio ineunte* 40, 6 janvier 2001, dans AAS, 93 (2001), 294 : « Totiens hisce iam superioribus annis adhortationem repetivimus ad *novam evangelizationem*. Iterum nunc eam inculcamus, praesertim ut persuadeatur in nobis impulsionem originum ipsarum denuo esse accendendam, unde ardore invicem ipsi apostolicae praedicationis post Pentecosten perfundamur. Incensa illa Pauli affectio in nobis est rursus sentienda olim exclamantis : « Vae enim mihi est, si non evangelizavero ! » (*1 Cor* 9,16) ». Traduction française : JEAN-PAUL II, lettre apostolique *Novo millennio ineunte*, 6 janvier 2001, accessible sur http://w2.vatican.va/content/john-paul-ii/fr/apost_letters/2001/documents/hf_jp-ii_apl_20010106_novo-millennio-ineunte.html

² PAUL VI, exhortation apostolique *Evangelii nuntiandi*, 8 décembre 1975, dans AAS, 68 (1976), 5-76. Traduction française accessible sur http://w2.vatican.va/content/paul-vi/fr/apost_exhortations/documents/hf_p-vi_exh_19751208_evangelii-nuntiandi.html

³ *Evangelii nuntiandi*, no. 2.

définie « en termes d'annonce du Christ à ceux qui l'ignorent, de prédication, de catéchèse, de baptême et d'autres sacrements à conférer »⁴.

L'expression « nouvelle évangélisation » vient de Jean-Paul II. Il l'a employée pour la première fois en 1979, pendant sa visite apostolique en Pologne, dans l'homélie prononcée pendant la Messe célébrée au sanctuaire de la Sainte Croix à Mogila :

C'est dans cette pensée qu'a été élevée aussi la première croix à Mogila, aux environs de Cracovie, aux environs de Stara Huta. La nouvelle croix de bois a été élevée non loin d'ici, durant les célébrations du millénaire. Avec elle nous avons reçu un signe, celui qu'au seuil du nouveau millénaire — en ces temps nouveaux en ces nouvelles conditions de vie — l'Évangile est de nouveau annoncé. Une nouvelle évangélisation est commencée, comme s'il s'agissait d'une deuxième annonce, bien qu'en réalité ce soit toujours la même. La croix se tient debout sur le monde qui change. Nous disons merci aujourd'hui, devant la croix de Mogila, devant la croix de Nowa Huta pour ce nouveau commencement de l'évangélisation qui s'est réalisé. Et nous demandons tous qu'elle soit fructueuse, comme la première — et même encore plus⁵.

Dans un discours aux évêques du CELAM⁶, le 9 mars 1983 à Port-au-Prince en Haïti, Jean-Paul II a expliqué le sens de cette nouvelle évangélisation :

La commémoration des cinq cents ans d'évangélisation aura sa propre signification s'il y a un engagement de la part de vous, les évêques, avec votre presbyterium et votre peuple ; un engagement pas de ré-évangélisation, mais d'une nouvelle évangélisation. Nouvelle dans son ardeur, dans ses méthodes et dans ses expressions⁷.

⁴ Ibid., no. 17.

⁵ JEAN-PAUL II, homélie pendant la Messe au sanctuaire de la Sainte Croix à Mogila près de Cracovie, 9 juin 1979, dans AAS, 71 (1979), 865-866 : « Z tą myślą postawiono też ów pierwszy krzyż w podkrakowskiej Mogile — w pobliżu Starej Huty postawiono opodal tego miejsca nowy, drewniany krzyż, było to już w okresie Millennium. Otrzymaliśmy znak, że na progu nowego tysiąclecia — w te nowe czasy i nowe warunki wchodzi na nowo Ewangelia. Że rozpoczęła się nowa ewangelizacja, jak gdyby druga, a przecież ta sama co pierwsza. Krzyż trwa, choć zmienia się świat. Dziękujemy dzisiaj przy krzyżu mogiłskim, a zarazem przy krzyżu nowo-huckim za ten nowy początek ewangelizacji, który tutaj się dokonał. I prosimy wszyscy, ażeby był tak samo owocny — owszem, jeszcze bardziej owocny, jak pierwszy ». Traduction française sur http://w2.vatican.va/content/john-paul-ii/fr/homilies/1979/documents/hf_jp-ii_hom_19790609_polonia-mogila-nowa-huta.html

⁶ C.E.L.A.M. est l'abréviation pour « Consejo Episcopal Latinoamericano ». Cf. *Anuario Pontificio per l'Anno 2015*, Cité du Vatican, Libreria Editrice Vaticana, 2015, 1096.

⁷ JEAN-PAUL II, allocution aux évêques-membres du Conseil épiscopal Latino-américain, 9 mars 1983, dans AAS, 75/I (1983), 778 : « La conmemoración del medio milenio de evangelización tendrá su significación plena si es un compromiso vuestro como Obispos, junto con vuestro Presbiterio y fieles ; compromiso, no de re-evangelización, pero sí de una evangelización nueva. Nueva en su ardor, en sus métodos, en su expresión ».

L'appel à une nouvelle évangélisation serait un thème de retour pour Jean-Paul II. Quand il a visité la Belgique pour la première fois en 1985 en tant que pape, il a invité les évêques belges à entreprendre une nouvelle évangélisation. À l'occasion de sa rencontre avec les évêques des États-Unis au Petit Séminaire de Notre-Dame des Anges (Los Angeles) le 16 septembre 1987, Jean-Paul II a souligné la « nécessité aujourd'hui pour un nouvel effort d'évangélisation et de catéchèse dirigé à l'esprit »⁸. À de nombreuses autres occasions, le Souverain Pontife n'a pas manqué d'appeler à cette nouvelle évangélisation.

Dans la bulle d'indiction du grand jubilé de l'an 2000, Jean-Paul II écrivait de nouveau sur la nouvelle évangélisation : « Le temps de Noël sera ainsi le cœur vibrant de l'Année sainte, qui introduira dans la vie de l'Église l'abondance des dons de l'Esprit pour une nouvelle évangélisation »⁹. Dans de nombreuses exhortations apostoliques post-synodales, la nouvelle évangélisation a été aussi mentionnée, parfois sous un autre nom. Ce fut le cas pour *Christifideles laici* (1988), où le mot ré-évangélisation a été utilisé, *Pastores dabo vobis* (1992), et *Vita consecrata* (1996). Ce n'est pas par hasard que ces trois exhortations aient été adressées à trois acteurs essentiels dans le travail d'évangélisation : les laïcs, les prêtres et les religieux. Dans l'exhortation apostolique post-synodale *Ecclesia in America* (1999), Jean-Paul II mentionne explicitement à plusieurs reprises la nouvelle évangélisation. Dans cette exhortation, il explique de nouveau ce qu'il entend par « nouvelle évangélisation » :

Comme je l'ai dit en d'autres occasions, le caractère singulier et nouveau de la situation où le monde et l'Église se trouvent, à la veille du troisième millénaire, et les exigences qui en découlent, font que la mission évangélisatrice exige aujourd'hui un nouveau programme, que l'on peut définir dans son ensemble comme « nouvelle évangélisation ». En tant que Pasteur suprême de l'Église, je désire ardemment inviter tous les membres du peuple de Dieu, particulièrement ceux qui vivent dans le continent américain — c'est sur son sol que pour la première fois j'ai fait appel à un engagement nouveau « dans sa ferveur, dans ses méthodes, dans son expression » — à faire leur ce projet et à y collaborer. En acceptant cette mission, que chacun se souvienne que le nœud vital de la nouvelle évangélisation doit être l'annonce claire et sans équivoque de la personne de Jésus

⁸ JEAN-PAUL II, allocution aux évêques des États-Unis 7, 16 septembre 1987, dans AAS, 80 (1988), 793 : « need today for a new effort of evangelization and catechesis directed to the mind ».

⁹ JEAN-PAUL II, bulle d'indiction du grand jubilé de l'an 2000 *Incarnationis mysterium* 6, 29 novembre 1998, dans AAS, 91 (1999), 135 : « Natalicium tempus ita fiet pulsans Anni Sancti velut cor, quod Ecclesiae in vitam donorum Spiritus abundantiam ad novam evangelizationem infundet ».

Christ, c'est-à-dire l'annonce de son nom, de sa doctrine, de sa vie, de ses promesses et du Royaume qu'il s'est acquis par son mystère pascal¹⁰.

La nouvelle évangélisation a également été un thème important pendant le pontificat de Benoît XVI, comme en témoignent, d'une part, la création d'un nouveau dicastère au sein de la Curie romaine, le Conseil pontifical pour la promotion de la nouvelle évangélisation¹¹, et, d'autre part, la XIII^{ème} Assemblée Générale Ordinaire du Synode des évêques, du 7 au 28 octobre 2012, pour discuter du thème « La nouvelle évangélisation pour la transmission de la foi chrétienne ». Le Pape Benoît a également souligné l'importance de la nouvelle évangélisation en promulguant une *Année de la foi*, à compter du 11 octobre 2012, et se terminant le 24 novembre 2013¹². Le début de l'Année de la foi marquait le vingtième anniversaire de la publication du Catéchisme de l'Église catholique et coïncidait presque parfaitement avec le début de la XIII^{ème} Assemblée Générale Ordinaire du Synode des évêques sur *La nouvelle évangélisation pour la transmission de la foi chrétienne*.

Le Pape François allait poursuivre le programme tracé par son prédécesseur dans son exhortation apostolique faisant suite au synode sur la nouvelle évangélisation en publiant l'exhortation apostolique *Evangelii gaudium*¹³. Un mois plus tôt, dans son discours aux participants à l'assemblée plénière du Conseil pontifical pour la promotion de la nouvelle évangélisation¹⁴, le Pape François disait :

Nouvelle évangélisation signifie réveiller la vie de la foi dans le cœur et dans l'esprit de nos contemporains. La foi est un don de Dieu, mais il est important

¹⁰ JEAN-PAUL II, exhortation apostolique post-synodale *Ecclesia in America* 66, 22 janvier 1999, Cité du Vatican, Libreria Editrice Vaticana, 1999, 119-120.

¹¹ Ce Conseil fut érigé par Benoît XVI le 29 juin 2010, et un premier président fut nommé le 30 juin 2010. Le document fondationnel fut publié le 12 octobre 2010 : BENOÎT XVI, motu proprio *Ubicumque et semper*, 21 septembre 2010, dans AAS, 102 (2010), 788-792.

¹² BENOÎT XVI, motu proprio *Porta fidei*, 11 octobre 2011, dans AAS, 103 (2011), 723-734.

¹³ FRANÇOIS, exhortation apostolique *Evangelii gaudium*, 24 novembre 2013, Cité du Vatican, Typographie Vaticane, 2013.

¹⁴ FRANÇOIS, discours aux participants à l'assemblée plénière du Conseil pontifical pour la promotion de la nouvelle évangélisation, 14 octobre 2013, dans AAS, 105 (2013), 965 : « Nuova evangelizzazione significa risvegliare nel cuore e nella mente dei nostri contemporanei la vita della fede. La fede è un dono di Dio, ma è importante che noi cristiani mostriamo di vivere in modo concreto la fede, attraverso l'amore, la concordia, la gioia, la sofferenza, perché questo suscita delle domande, come all'inizio del cammino della Chiesa : perché vivono così ? Che cosa li spinge ? Sono interrogativi che portano al cuore dell'evangelizzazione, che è la testimonianza della fede e della carità. Ciò di cui abbiamo bisogno, specialmente in questi tempi, sono testimoni credibili che con la vita e anche con la parola rendano visibile il Vangelo, risvegliino l'attrazione per Gesù Cristo, per la bellezza di Dio. [...] La nuova evangelizzazione è un movimento rinnovato verso chi ha smarrito la fede e

que nous, chrétiens, nous fassions voir que nous vivons la foi de manière concrète, à travers l'amour, la concorde, la joie, la souffrance, car cela suscite des questions, comme au début du chemin de l'Église : pourquoi vivent-ils ainsi ? Qu'est-ce qui les pousse ? Ce sont des interrogations qui conduisent au cœur de l'évangélisation, qui est le *témoignage* de la foi et de la charité. Ce dont nous avons besoin, en particulier à cette époque, sont des témoins crédibles qui, à travers leur vie et aussi leur parole, rendent l'Évangile visible, réveillent l'attraction pour Jésus Christ, pour la beauté de Dieu. [...] La nouvelle évangélisation est un mouvement renouvelé vers qui a égaré la foi et le sens profond de la vie.

Le point clé du message du Pape François sur la nouvelle évangélisation est la nécessité de témoins crédibles qui rendront l'Évangile visible par leur vie et par leurs paroles. Comment cela peut-il s'appliquer à la Curie romaine ? En d'autres termes, comment la réforme de la Curie romaine peut-elle être au service de cette nouvelle évangélisation, demandée par Jean-Paul II, Benoît XVI et maintenant François ?

2 — Réforme de la Curie romaine

L'éventuelle réforme de la Curie romaine ne peut être sérieusement envisagée sans considérer son but d'une part et ses réformes précédentes d'autre part.

2.1 — Nature de la Curie romaine

Pour s'acquitter de ses responsabilités en tant qu'évêque du diocèse de Rome, en tant que pasteur de l'Église universelle, et en tant que chef de l'État de la Cité du Vatican, le pape se fait assister par autant d'organismes ou institutions. Historiquement, cette assistance a pris diverses formes et est devenue de plus en plus systématique au fil du temps. En tant que pasteur de l'Église universelle, comme on le sait, l'évêque de Rome est assisté par la Curie romaine.

Dans le Code de 1917, la Curie romaine a été traitée de manière très détaillée (CIC 242-264)¹⁵, alors que le présent Code lui consacre explicitement

il senso profondo della vita ». Traduction française de http://w2.vatican.va/content/francesco/fr/speeches/2013/october/documents/papa-francesco_20131014_plenaria-consiglio-nuova-evangelizzazione.html

¹⁵ *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus*, Rome, Typis Polyglottis Vaticanis, 1917.

très peu de textes (cc 360-361 ; 1442-1445)¹⁶, le législateur préférant renvoyer à une loi spéciale, c'est-à-dire la constitution apostolique *Pastor bonus* (1988), promulguée cinq ans après la promulgation du Code¹⁷.

Le terme « curie » vient du droit romain, étant utilisé pour désigner l'une des trente divisions du peuple romain créées par Romulus, c'est-à-dire trois tribus de dix curies. La signification a changé peu à peu pour désigner une assemblée législative : d'abord le bâtiment où était situé le siège de l'assemblée, et plus tard, l'assemblée elle-même, c'est-à-dire le Sénat romain. Dans l'histoire, le terme « curie » a été également utilisé pour indiquer un tribunal dans le palais royal, ou la cour royale elle-même, ou un tribunal. À présent, le terme « curie » désigne l'organisation de la cour pontificale ou romaine, tout comme la curie diocésaine¹⁸.

Jusqu'au onzième siècle, le pape a fait appel au presbyterium pour l'assister dans sa mission en tant que pasteur universel de l'Église. Ce *presbyterium* comprenait tout le clergé de la ville de Rome, sous l'autorité du pape, mais pour être restreint et pour désigner seulement les prêtres des *tituli* qui formaient le presbyterium et assistaient le pape. Les prêtres des *tituli* détenaient les titres des paroisses romaines ; à partir du sixième siècle, ils sont devenus les *presbyteri cardinales*. Du onzième siècle jusqu'à la réforme de Sixte Quint, le presbyterium a été remplacé par le consistoire. Le pape organisait de plus en plus fréquemment ces réunions avec ses cardinaux en consistoire pour discuter des affaires importantes de l'Église, à l'origine une fois par mois, mais plus tard plusieurs fois par semaine. Ces deux formes d'organisation du gouvernement de l'Église universelle ont précédé une organisation plus structurée et plus spécialisée¹⁹.

¹⁶ *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus*, Cité du Vatican, Libreria Editrice Vaticana, 1983. Traduction française du *Code de Droit canonique. Texte officiel et traduction française par la Société internationale de Droit canonique et de Législations religieuses comparées avec le concours de la Faculté de droit canonique de l'Université Saint-Paul d'Ottawa et de la Faculté de droit canonique de l'Institut catholique de Paris*, Paris, Cerf, 1984. Les traductions en français des canons de ce Code sont prises de cette source sauf indication contraire.

¹⁷ JEAN-PAUL II, constitution apostolique *Pastor bonus*, 28 juin 1988, dans AAS, 80 (1988), 841-923, ci-après cité comme PB. La traduction française est prise du *Code de droit canonique bilingue et annoté*, E. CAPARROS et H. AUBÉ (dir.), Montréal, Wilson & Lafleur, 2007.

¹⁸ J.-B. D'ONORIO, *Le Pape et le gouvernement de l'Église*, Paris, Fleurus-Tardy, 1992, 287 ; H.J. WOLFF, *Roman Law. An Historical Introduction*, Norman, University of Oklahoma Press, 1951, 39 ; B.A. GARNER (dir.), *Black's Law Dictionary*, 8th ed., St. Paul, MN, Thomson West, 2004, 410.

¹⁹ DDC, v^o *Curie romaine* ; W.F. AKVELD, *De Romeinse Curie. De geschiedenis van het bestuur van de wereldkerk*, Nijmegen, Valkhof Pers, 1997, 17-65 ; N. DEL RE, *La Curia Romana. Lineamenti Storico-Giuridici*, Cité du Vatican, Libreria Editrice Vaticana, 1998,

2.2 — Sixte Quint et la constitution *Immensa aeterni Dei* (1588)

Avec la constitution *Immensa aeterni Dei* du 22 janvier 1588²⁰, Sixte Quint a donné une structure formelle à la Curie romaine en créant quinze congrégations. Certaines de ces congrégations existaient déjà, parfois sous un autre nom. Chaque congrégation était compétente pour des objets spécifiques. Cette nouvelle structure a été une nouvelle étape dans le développement réel de la Curie romaine : en établissant ces congrégations avec une compétence précise et limitée, le Pape a remplacé le collège des cardinaux réunis en consistoire, par divers collèges de quelques cardinaux. L'organisation générale de ces congrégations était assez simple : chacune était dirigée par des cardinaux, en général un minimum de trois et un maximum de cinq. Ces cardinaux avaient la faculté de nommer un secrétaire et d'embaucher des théologiens et des canonistes compétents en la matière, comme consultants de la congrégation. Le but de la réorganisation de Sixte Quint était de démontrer de la clarté, de l'ordre et de la simplicité.

Les quinze congrégations pouvaient être divisées en deux catégories : d'une part les congrégations avec une compétence universelle et impliquant la force spirituelle (dix au total)²¹ et d'autre part les congrégations avec une compétence exclusive pour les questions relatives à l'État pontifical et donc relevant du pouvoir temporel (cinq congrégations)²². L'organisation de la

20-27 ; D'ONORIO, 288-290 ; J.H. PROVOST, « The Hierarchical Constitution of the Church », dans J.A. CORIDEN, T.J. GREEN et D.E. HEINTSCHEL (dir.), *The Code of Canon Law: A Text and Commentary*, New York/Mahwah, NJ, Paulist Press, 1985, 292-294 ; A.M. STICKLER, « Le riforme della Curia nella storia della Chiesa », dans P.A. BONNET et C. GULLO (dir.), *La Curia Romana nella Cost. Ap. « Pastor Bonus »*, Cité du Vatican, Libreria Editrice Vaticana, 1990, 1-6.

²⁰ SIXTE V, constitution *Immensa aeterni Dei*, 22 janvier 1588, dans *Bullarium Romanum*, Naples, Caporaso, 1863, vol. 8, 985-999.

²¹ Les dix congrégations à compétence universelle ayant une pouvoir spirituelle étaient : (1) *Congregatio prima pro sancta Inquisitione* ; (2) *Congregatio secunda pro Signatura Gratiae* ; (3) *Congregatio tertia pro erectione ecclesiarum et provisionibus consistorialibus* ; (4) *Congregatio quinta pro sacris ritibus et caeremoniis* ; (5) *Congregatio septima pro Indice librorum prohibitorum* ; (6) *Congregatio octava pro executione et interpretatione concilii Tridentini* ; (7) *Congregatio decima pro Universitate Studii Romani* ; (8) *Congregatio undecima pro consultationibus regularium* ; (9) *Congregatio duodecima pro consultationibus episcoporum et aliorum praelatorum* ; (10) *Congregatio decimaquarta pro typographia Vaticana*.

²² Les cinq congrégations avec une compétence exclusive pour les affaires des États Pontificaux et donc relevant du pouvoir temporel étaient : (1) *Congregatio quarta pro ubertate annonae Status Ecclesiastici* ; (2) *Congregatio sexta pro classe paranda et servanda ad Status Ecclesiastici defensionem* ; (3) *Congregatio nona pro Status Ecclesiastici gravaminibus sublevandis* ; (4) *Congregatio decimatertia pro viis, pontibus et aquis curandis* ; (5) *Congregatio decimaquinta pro consultationibus negotiorum Status Ecclesiastici*.

Curie romaine par Sixte Quint reflète donc aussi le contexte particulier du temps et n'est pas seulement orientée vers le gouvernement de l'Église universelle, mais aussi envers le gouvernement des États pontificaux. Presque chaque successeur de Sixte Quint apportera des changements, en ajoutant des dicastères ou en transférant des compétences d'un dicastère à un autre. Cependant, la structure principale est demeurée intacte jusqu'en 1908.

2.3 — Pie X et *Sapienti consilio* (1908)

Pie X (1903-1914) a été conduit à faire une réforme structurelle de la Curie romaine. Il a d'abord fait quelques modifications mineures en 1903, 1904 et 1906²³. La constitution apostolique *Sapienti consilio* (29 juin 1908) a réorganisé radicalement les structures existantes²⁴. Il avait fallu cinq projets avant que le texte final soit prêt²⁵. La réforme était importante et radicale pour deux raisons : (1) la nouvelle structure a pris en compte le fait que les États pontificaux avaient disparu, et donc les dicastères ayant des compétences pour ces États pontificaux ont été formellement supprimés ; (2) la nouvelle structure était surtout plus simple, avec une délimitation plus claire des compétences. Onze congrégations, trois tribunaux et cinq bureaux formaient alors la Curie romaine. La réforme de Pie X a été insérée dans le Code de droit canonique de 1917, avec quelques changements²⁶. Pie XI,

²³ Il s'agissait notamment d'une fusion des Congrégations pour l'Élection des Évêques et du Saint-Office (PIE X, motu proprio *Romanis Pontificibus*, 17 décembre 1903, dans P. GAS-PARRI (dir.), *Codicis Iuris Canonici Fontes. Romani Pontifices usque ad annum 1745*, Rome, Typis Polyglottis Vaticanis, 1925, vol. 3, 619-621), d'une fusion de la Congrégation des Rites avec celle des Indulgences et des Reliques (PIE X, motu proprio *Quae in Ecclesiae bonum*, 28 janvier 1904, dans *Acta Pontificia*, 1 [1903], 339-340) et de l'extension de la Congrégation des Évêques et des Réguliers (PIE X, motu proprio *Sacrae Congregationi*, 26 mai 1906, dans ASS, 39 [1906], 203-204).

²⁴ PIE X, constitution apostolique *Sapienti consilio*, 28 juin 1903, dans AAS, 1 (1909), 7-19. Voy. F. JANKOWIAK, *La Curie romaine de Pie IX à Pie X : le gouvernement central de l'Église et la fin des États pontificaux (1846-1914)*, Rome, École française de Rome, 2007.

²⁵ D'ONORIO, 296.

²⁶ Avant la promulgation du Code de 1917, Benoît XV réformait la Curie romaine. La *Congregatio studiorum* devenait la *Congregatio de Seminariis et Studiorum Universitatibus* (cf. BENOÎT XV, motu proprio *Seminaria clericorum*, 4 novembre 1915, dans AAS, 7 [1915], 493-495). Une nouvelle Congrégation fut créée : la Congrégation pour la Propagation de la Foi n'était plus compétente pour les Églises Orientales, mais une nouvelle Congrégation, la Congrégation pour l'Église Orientale, assumerait désormais cette tâche (cf. BENOÎT XV, motu proprio *Dei providentis*, 1 mai 1917, dans AAS, 9 [1917], 529-531). La Congrégation pour l'Index fut absorbée par le Saint Office, tandis que la compétence pour la pratique des indulgences fut transférée du Saint Office à la Pénitencerie (cf. BENOÎT XV, motu proprio *Alloquentes proxime*, 25 mars 1917, dans AAS, 9 [1917], 167). Finalement, les deux collègues

Pie XII et Jean XXIII ont conservé la Curie romaine intacte, même si ici et là, quelques modifications mineures ont été apportées.

2.4 — Paul VI et *Regimini Ecclesiae universae* (1967), et Jean-Paul II et *Pastor bonus* (1988)

Presque immédiatement après son élection, Paul VI a annoncé le 21 septembre 1963 à la Curie romaine l'idée d'une réforme²⁷. Il n'était pas le seul : les Pères conciliaires avaient exprimé le désir d'une nouvelle organisation des dicastères de la Curie romaine, plus adaptés aux besoins de l'époque, des régions et des rites, tout en reconnaissant l'aide précieuse que la Curie avait apportée au Pontife romain et aux pasteurs de l'Église.

Immédiatement après le Concile, Paul VI créait des commissions ou conseils dans le but de mettre en pratique certains souhaits des Pères conciliaires²⁸. La réforme majeure de la Curie romaine allait avoir lieu quelque temps plus tard. À l'origine, chaque dicastère ferait l'objet d'une législation séparée, mais après avoir pris soin du Saint Office, maintenant la Congrégation pour la Doctrine de la Foi²⁹, la méthode a été abandonnée et l'approche d'un document unique pour l'ensemble de la réforme a été choisie³⁰. Cela conduirait à la constitution apostolique *Regimini Ecclesiae universae* du 15 août 1967³¹.

de prélats furent rétablis au sein de la Signature Apostolique (cf. BENOÎT XV, chirographe *Attentis expositis*, 28 juin 1915, dans AAS, 7 [1915], 325) et une commission de cardinaux était créée pour résoudre des conflits de compétence.

²⁷ PAUL VI, discours aux cardinaux, évêques, prélats et autres fonctionnaires de la Curie romaine, 21 septembre 1963, dans AAS, 55 (1963), 793-800, en particulier 798 : « Che debbano essere introdotte nella Curia Romana alcune riforme non è solo facile prevedere, ma è bene desiderare. Come ognuno sa, questo annoso e complesso organismo nel suo riordinamento più recente rimonta alla famosa Costituzione '*Immensa aeterni Dei*' del 1588 di Papa Sisto V ; lo rigenerò, con la Costituzione '*Sapienti consilio*' del 1908 S. Pio X ; e il Codice di Diritto Canonico nel 1917, fece sostanzialmente sua tale architettura. Sono passati molti anni : è spiegabile come tale ordinamento sia aggravato dalla sua stessa venerabile età, come risenta la disparità dei suoi organi e della sua prassi rispetto alle necessità ed agli usi dei nuovi tempi, come senta al tempo stesso il bisogno di semplificarsi e decentrarsi e quello di allargarsi e abilitarsi a nuove funzioni. Occorreranno perciò varie riforme. Saranno certamente ponderate, saranno allineate secondo le venerabili e ragionevoli tradizioni da un lato, secondo i bisogni dei tempi, dall'altro ».

²⁸ PAUL VI, motu proprio *In fructibus multis*, 2 avril 1964, dans AAS, 56 (1964), 289-292 ; PAUL VI, motu proprio *Catholicam Christi Ecclesiam*, 6 janvier 1967, dans AAS, 59 (1967), 25-28 ; PAUL VI, motu proprio *Ad futuram rei memoriam*, 19 mai 1964, dans AAS, 56 (1964), 560.

²⁹ PAUL VI, motu proprio *Integrae servandae*, 7 août 1965, dans AAS, 57 (1965), 952-955.

³⁰ D'ONORIO, 300-301.

³¹ Pour une analyse approfondie de cette réforme : I. GORDON, « De Curia Romana renovata. Renovatio 'desiderata' et renovatio 'facta' conferuntur », dans *Periodica*, 58 (1969), 59-116.

La place centrale dans la nouvelle structure est réservée à la Secrétairerie d'État et au Conseil pour les Affaires Publiques de l'Église. Ces deux dicastères occupent une place particulière parce qu'ils sont étroitement liés avec le pape. Le Secrétariat d'État est aussi appelé Secrétariat papal. Tout cela reflète l'idée de Paul VI qui voulait que le Secrétariat d'État fonctionne comme modérateur de la curie et coordinateur de ses activités. Un projet de réforme était prêt dès 1978, peu de temps avant la mort de Paul VI³².

Jean-Paul II a lui aussi commencé sa réforme avec quelques modifications ou changements mineurs au sein de la Curie romaine, avant d'en entreprendre une réorganisation majeure. La réforme de la Curie romaine avec la constitution apostolique *Pastor bonus* est toutefois considérée comme une continuation de la réforme engagée par Paul VI³³, car aucun changement structurel n'a été fait : il s'agissait seulement d'une incorporation des modifications apportées après 1967 et d'une simplification de la structure précédente³⁴.

Le Secrétariat d'État a maintenant deux sections, l'une pour les affaires générales et l'autre pour les relations avec les États. La dernière a pris en charge la fonction du Conseil pour les Affaires Publiques de l'Église, maintenant aboli. Neuf congrégations, trois tribunaux, et douze conseils pontificaux complètent le tableau³⁵.

2.5 — Principes théologiques et juridiques de *Pastor bonus*

Il est important de noter que le titre latin *Pastor bonus* a été demandé explicitement par Jean-Paul II, qui a voulu donner à la constitution apostolique et à la Curie romaine d'abord un caractère pastoral³⁶. En outre, la théologie sous-tendant la réforme est aussi explicitement présente dans la constitution apostolique et met l'accent sur la nature de la Curie romaine comme étant au service du Pontife romain. Finalement et surtout, l'ensemble

³² DEL RE, 57 ; D'ONORIO, 302-303.

³³ STICKLER, 1.

³⁴ Certains auteurs ne partagent pas l'analyse qu'il s'agit d'une continuation de la réforme de Paul VI. Cf. DEL RE, 58.

³⁵ Jean-Paul II a réuni le Conseil Pontifical pour le Dialogue avec les Non-croyants et le Conseil Pontifical pour la Culture : motu proprio *Inde a Pontificatus*, 25 mars 1993. Les douze Conseils Pontificaux étaient maintenant réduits à onze. Quand Benoît XVI érigeait le Conseil Pontifical pour la Nouvelle Évangélisation, avec le motu proprio *Ubicumque et semper*, on avait de nouveaux douze Conseils Pontificaux.

³⁶ J. BEYER, « Le linee fondamentali della costituzione apostolica 'Pastor Bonus' », dans P.A. BONNET et C. GULLO (dir.), *La Curia Romana nella Cost. Ap. « Pastor Bonus »*, Cité du Vatican, Libreria Editrice Vaticana, 1990, 17.

du document reflète également le fondement théologique du ministère de l'évêque de Rome.

Un certain nombre de principes théologiques et juridiques régissant l'organisation de la curie se retrouvent dans la constitution apostolique *Pastor bonus*. Ils peuvent constituer des critères à la lumière desquels les efforts de réforme peuvent être évalués. La Curie romaine est essentiellement au service de la communion des Églises. La visite *ad limina* (c. 400) et les rapports quinquennaux (c. 399) sont des instruments de la catholicité et de la collégialité : ils forment une occasion idéale pour le Pape et la Curie romaine d'une part et pour un évêque ou un groupe d'évêques d'autre part d'avoir un échange pour le bien des Églises concernées. L'annexe spéciale à *Pastor bonus* reflète et souligne cette idée.

Les réformes curiales de 1967 et 1988 étaient des tentatives de réforme de la Curie romaine à la lumière de l'ecclésiologie conciliaire, des exigences contemporaines et, pour la réforme de 1988, du nouveau Code de droit canonique. Dans le décret *Christus Dominus* sur la charge pastorale des évêques dans l'Église, les Pères conciliaires avaient formulé quelques idées sur la réforme de la Curie romaine³⁷ :

9. Dans l'exercice de son pouvoir suprême, plénier et immédiat sur l'Église universelle, le Pontife romain se sert des dicastères de la Curie romaine ;

³⁷ VATICAN II, décret *Christus Dominus* 9-10, 28 octobre 1965, dans AAS (1966), 676-677. Traduction française de *Le Concile Vatican II (1962-1965). Texte intégral*, Perpignan, Éditions Artège, 2012, 533-534.

« 9. In exercenda suprema, plena et immediata potestate in universam Ecclesiam, Romanus Pontifex utitur Romanae Curiae Dicasteriis, quae proinde nomine et auctoritate illius munus suum explent in bonum Ecclesiarum et in servitium Sacrorum Pastorum ».

« Exoptant autem Sacrosancti Concilii Patres ut haec Dicasteria, quae quidem Romano Pontifici atque Ecclesiae Pastoribus eximum praeberunt auxilium, novae ordinationi, necessitatibus temporum, regionum ac Rituum magis aptatae, subiciantur, praesertim quod spectat eorundem numerum, nomen, competentiam propriamque procedendi rationem, atque inter se laborum coordinationem. Exoptant pariter ut, ratione habita muneris pastoralis Episcoporum proprii, Legatorum Romani Pontificis officium pressius determinetur ».

« 10. Praeterea cum eadem Dicasteria ad universalis Ecclesiae bonum sint constituta, optatur ut eorum Membra, Officiales et Consultores, necnon Legati Romani Pontificis, quantum fieri potest, ex diversis Ecclesiae regionibus magis assumantur, ita ut catholicae Ecclesiae officia seu organa centralia indolem vere universalem prae se ferant ».

« In votis quoque est ut inter Dicasteriorum Membra cooptentur etiam aliqui Episcopi praesertim dioecesani, qui mentem, optata ac necessitates omnium Ecclesiarum Summo Pontifici plenius referre valeant ».

« Denique perutile esse censent Concilii Patres si eadem Dicasteria laicos, virtute, scientia et experientia praestantes, magis audiant, ita ut et ipsi in rebus Ecclesiae partes sibi congruentes habeant ».

c'est donc en son nom et par son autorité que ceux-ci remplissent leur tâche pour le bien des Églises et le service des pasteurs sacrés.

Les Pères du saint concile souhaitent que ces dicastères, qui certes ont apporté au Pontife romain et aux pasteurs de l'Église une aide magnifique, soient soumis à une nouvelle organisation plus en rapport avec les besoins des temps, des pays et des rites, notamment en ce qui concerne leur nombre, leur dénomination, leur compétence, leurs méthodes propres de travail et la coordination de leurs travaux. Ils souhaitent également que, compte tenu de la propre charge pastorale des évêques, la fonction des légats du Pontife romain soit déterminée de façon plus précise.

10. En outre, du fait que ces dicastères ont été établis pour le bien de l'Église universelle, on souhaite que leurs membres, leur personnel et leurs consultants — et de même les légats du Pontife romain — soient, dans la mesure du possible, davantage choisis dans les diverses contrées de l'Église. C'est ainsi que les administrations ou organes centraux de l'Église catholique présenteront un caractère véritablement universel.

On forme également le vœu que, parmi les membres des dicastères, soient admis aussi quelques évêques, surtout diocésains, qui puissent présenter au Souverain Pontife, des rapports plus complets sur la mentalité, les désirs et les besoins de toutes les Églises.

Enfin, les Pères du Concile estiment très utile que ces mêmes dicastères entendent davantage des laïcs, réputés pour leurs qualités, leur science et leur expérience, en sorte que ces laïcs aussi jouent dans les affaires de l'Église le rôle qui leur revient.

Un certain nombre de ces souhaits ont été effectivement exaucés par Paul VI dans *Regimini Ecclesiae universae* et par Jean-Paul II dans *Pastor bonus*. Quelle future réforme serait-elle maintenant possible ? Et, le cas échéant, comment cette réforme pourrait-elle être au service de la nouvelle évangélisation ?

3 — *Curie romaine et nouvelle évangélisation*

En octobre 1981, lors d'une réunion plénière de la Commission pour la révision du Code, une des questions posées aux membres était de savoir si la mise en place facultative des tribunaux administratifs devait rester la règle ou si un retour à l'érection obligatoire des tribunaux administratifs, comme prévu dans les versions antérieures, devait être pris en considération³⁸. Selon le canon

³⁸ PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS INTERPRETANDIS, *Acta et Documenta Pontificiae Commissionis Codici Iuris Canonici Recognoscendo. Congregatio Plenaria, Diebus 20-29 octobris 1981 habita*, Cité du Vatican : Typis Polyglottis Vaticanis, 1991, 169.

1689 §1 du schéma de 1980, la mise en place des tribunaux administratifs par la conférence des évêques n'était plus obligatoire. Dans son introduction, l'archevêque Castillo Lara, alors secrétaire de la Commission pour la révision du Code, a déclaré que dans l'esprit de la Commission, le caractère non obligatoire des tribunaux administratifs enlevait quelques fardeaux des épaules des conférences des évêques, là où il est déjà très difficile de trouver suffisamment de personnel pour les tribunaux ordinaires³⁹. Le Cardinal Marty, alors archevêque de Paris, était en faveur du rétablissement du caractère obligatoire de la mise en place des tribunaux administratifs par la conférence des évêques. Il a fait valoir qu'il ne serait pas bien, en particulier si et quand l'Église serait obligée d'ériger de tels tribunaux de toute façon sous la pression des événements⁴⁰. Une organisation efficace de la Curie romaine au service du Pontife romain, de l'Église universelle et des Églises particulières est très souhaitable. En même temps, la Curie romaine devrait montrer le bon exemple. Par conséquent, une nouvelle constitution apostolique pour remplacer *Pastor bonus* peut être insuffisante ou tout simplement ne pas être nécessaire, si un *novus habitus mentis* est adopté. Le message salvifique ne sera pas entendu si l'Église à tous les niveaux, y compris au niveau romain, ne sait pas enseigner par l'exemple. Ou, pour le dire avec les mots du Pape François : "Ce dont nous avons besoin en particulier en ces temps sont des témoins crédibles qui rendent l'Évangile visible par leur vie et par leurs paroles."

3.1 — Quelle sorte de réforme ?

Certains ont fait remarquer que *Pastor bonus* était dépassée et qu'une nouvelle constitution apostolique sur la Curie romaine était à prévoir. Il est loin d'être évident de savoir ce que cela signifie, surtout lorsque l'on considère que le groupe des neuf cardinaux qui avisent le Pape sur ce sujet particulier, ont, à l'exception du secrétaire d'État, peu ou aucune expérience avec ou dans la Curie romaine⁴¹. En outre, si une nouvelle constitution apostolique

³⁹ Cf. *ibid.*, 335-336.

⁴⁰ « Le canon dit que les Conférences épiscopales peuvent constituer des tribunaux administratifs. Ce libellé laisse rêveur... Tout d'abord c'est du mauvais droit : pour une telle mesure, peut-on laisser la liberté à l'autorité subalterne ? Ensuite, il est à craindre que les évêques ne soient amenés à créer des tribunaux administratifs sous la poussée de groupes ou à la faveur d'événements plus ou moins heureux. Le canon 19 du précédent Schema est à reprendre (constitua et non potest constituere) ». *Ibid.*, 171.

⁴¹ FRANÇOIS, chirographe par lequel est institué un Conseil de Cardinaux pour aider le Saint-Père dans le gouvernement de l'Église Universelle et pour étudier un projet de révision de la constitution apostolique *Pastor bonus* sur la Curie romaine, 28 septembre 2013, dans AAS, 105 (2013), 875-876.

doit réaffirmer qu'une collaboration plus étroite entre les dicastères est nécessaire, pourquoi alors a-t-on besoin d'une nouvelle constitution, estimant qu'un tel appel à une collaboration plus étroite est déjà dans le document actuel ?

3.1.1 – *Nouvelles Congrégations ?*

Il a été suggéré de fusionner certains dicastères et, dans un cas, même d'élever un Conseil pontifical, à savoir le Conseil Pontifical pour les Laïcs, au statut de Congrégation, en faisant valoir qu'il y a plus de laïcs dans l'Église que de clercs ou religieux et qu'ils méritent d'avoir leur propre Congrégation. Bien que cela puisse être vrai, et alors que la proposition de transformer le Conseil Pontifical pour les Laïcs en une Congrégation pour les Laïcs n'est pas nouvelle⁴², il est cependant important de garder à l'esprit que les congrégations en général exercent un pouvoir exécutif, tandis que les Conseils pontificaux sont des entités postconciliaires mises en place pour étudier de nouveaux problèmes pastoraux. Ils n'ont pas de pouvoir décisionnel, même si le Conseil Pontifical pour les Laïcs a à prendre des décisions pour, par exemple, ériger les associations internationales de fidèles⁴³. Ceci nous rappelle un principe important devant guider la révision du Code de droit canonique, à savoir le principe 7, appelant à une distinction plus claire entre les pouvoirs législatif, exécutif et judiciaire en vue d'une meilleure protection des droits des fidèles⁴⁴. La création d'une nouvelle Congrégation n'a de sens que lorsque cette Congrégation est créée pour une finalité déterminée, c'est-à-dire, lorsque la distinction essentielle entre l'exercice du pouvoir exécutif (Congrégations) et l'étude de nouveaux problèmes pastoraux (Conseils pontificaux) est bien définie⁴⁵. Il serait peut-être préférable de créer un lien permanent entre certains Conseils pontificaux et certaines Congrégations.

⁴² BEYER, 137 ; H. SCHMITZ, « Der Päpstliche Rat für die Laien und die internationalen Vereinigungen von Gläubigen », *AfkKR*, 173 (2004), 465-478.

⁴³ D'ONORIO, 353.

⁴⁴ *Communicationes*, 1 (1969), 83 : « potestatis ecclesiasticae clare distinguantur diversae functiones, videlicet legislativa, administrativa et iudicialis, atque apte definiantur a quibusdam organis singulae functiones exercentur ».

⁴⁵ J.H. PROVOST, « *Pastor bonus* : Reflections on the Reorganization of the Roman Curia », *The Jurist*, 48 (1988), 513, avec une référence au *relatio* joint au 1985 *Schema Legis Peculiaris de Curia Romana* : les congrégations participent à la *potestas regiminis* administrative, tandis que les conseils sont établis surtout pour l'étude, la promotion, l'animation pastorale, et d'autres raisons similaires, sans pour autant participer à cette *potestas regiminis* administrative.

En outre, il ne faut pas oublier que ceux qui ont reçu l'ordre sacré sont aptes, selon les dispositions du droit, à exercer le pouvoir de gouvernement — appelé parfois pouvoir de juridiction (cf. can. 129 §1) et dans lequel on distingue les pouvoirs législatif, exécutif et judiciaire (cf. can. 135 §1) — tandis que les fidèles laïcs ne peuvent que coopérer à l'exercice de ce pouvoir (cf. can. 129 §2)⁴⁶. Le lien étroit entre le pouvoir d'ordre et le pouvoir de juridiction doit être examiné si les fidèles laïcs reçoivent le pouvoir de gouvernement. Bien que ces deux pouvoirs n'aient pas toujours eu ce lien étroit dans l'histoire, Vatican II a rétabli ce lien et a créé des situations où il est presque impossible d'exercer le pouvoir de juridiction sans le pouvoir d'ordre⁴⁷.

Le pape a décidé de créer deux nouveaux dicastères, sans que soit mentionnée la nature de ceux-ci : s'agit-il de Congrégations ou de Conseils Pontificaux. Certes, le chef de chacun de ces dicastères porte le titre de préfet, ce qui pourrait suggérer que ces nouveaux organismes sont des Congrégations. D'autres éléments suggèrent plutôt qu'il s'agit de Conseils Pontificaux. Quoi qu'il en soit, ces nouveaux dicastères revêtent plutôt une forme hybride. Il faut cependant ajouter que ces deux nouvelles institutions de la Curie ne sont pas totalement nouvelles, puisqu'elles sont nées de la fusion de plusieurs Conseils pontificaux. Le nouveau Dicastère pour les Laïcs, la Famille et la Vie⁴⁸ a assumé à partir du 1^{er} septembre 2016 les compétences et les fonctions appartenant jusqu'alors au Conseil Pontifical pour les Laïcs et au Conseil Pontifical pour la Famille, entraînant l'abolition des Conseils pontificaux susmentionnés. Dans le nouveau Dicastère pour le Service du Développement Humain Intégral⁴⁹ seront regroupées, à partir du 1^{er} janvier 2017, les compétences des Conseils pontificaux actuels suivants : le Conseil Pontifical Justice et Paix, le Conseil Pontifical *Cor Unum*, le Conseil Pontifical pour la Pastorale des Migrants et des Personnes en Déplacement, et le Conseil Pontifical pour la Pastorale des Services de Santé. Ces quatre Conseils Pontificaux cesseront d'accomplir leurs fonctions suite à leur suppression. Conséquemment, les articles 142 à 153 de la constitution apostolique *Pastor bonus* seront abrogés à partir de cette date. Même si, techniquement, il s'agit de la création de deux nouveaux dicastères, il s'agit donc en

⁴⁶ Sur ce point, e.g. F.J. URRUTIA, « Delegation of the Executive Power of Governance », *Studia canonica*, 19 (1985), 339-355.

⁴⁷ Cf. l'étude importante de L. VILLEMEN, *Pouvoir d'ordre et pouvoir de juridiction. Histoire théologique de leur distinction*. Cogitatio Fidei 228, Paris, Les Éditions du Cerf, 2003.

⁴⁸ FRANÇOIS, motu proprio *Sedula Mater*, 15 août 2016, dans *L'Osservatore Romano. Édition quotidienne italienne*, 156/187 (17-18 août 2016), 8.

⁴⁹ FRANÇOIS, motu proprio *Humanam progressionem*, 17 août 2016, dans *L'Osservatore Romano. Édition quotidienne italienne*, 156/199 (17-18 août 2016), 6.

réalité de la fusion de plusieurs Conseils Pontificaux, de sorte que le nombre de ceux-ci passera de 12 à 6. Une telle opération n'est pas difficile à réaliser. Mais une question demeure : où est la vraie réforme ?

3.1.2 – *Diaconia iustitiae* ?

Il reste à savoir si une fusion de tous les tribunaux apostoliques avec le Conseil pontifical pour les textes législatifs sous le nom de *Diaconia iustitiae* serait une évolution bonne et souhaitable. Elle risque de confondre le for interne et le for externe, pour ne mentionner qu'un aspect important. Une telle fusion témoignerait sans doute aussi d'un manque de compréhension entre les fonctions administratives et les fonctions judiciaires qu'exerce la Curie romaine.

Certains changements dans la structure judiciaire seraient néanmoins utiles. À présent, il y a trois tribunaux apostoliques : le Tribunal de la Rote Romaine, la Pénitencerie Apostolique, et le Tribunal Suprême de la Signature Apostolique. Il y a aussi le tribunal apostolique de la Congrégation pour la Doctrine de la Foi. Ce dernier est compétent pour des délits spécifiques. Bien que les tribunaux exercent le pouvoir judiciaire, le Conseil Pontifical pour les Textes Législatifs a quelques compétences spécifiques : d'une part, il revient à ce Conseil de faire connaître l'interprétation authentique des lois universelles de l'Église, et d'autre part, le Conseil (1) garantit que les décrets généraux exécutoires et les instructions des dicastères de la Curie romaine soient conformes aux normes du droit en vigueur et soient rédigés dans la forme juridique requise (art. 156 PB) ; (2) examine les décrets généraux des assemblées d'évêques sous l'aspect juridique (art. 157 PB) ; et (3) décide si les lois particulières et les décrets généraux, émanant des législateurs au-dessous de l'autorité suprême, sont conformes aux lois universelles de l'Église (art. 158 PB). Pourquoi ne pas éliminer le Conseil Pontifical pour les Textes Législatifs et transférer les compétences ailleurs ? Les interprétations authentiques pourraient être confiées à la Secrétairerie d'État, car ce dicastère est censé être proche du Souverain Pontife (dans un récent passé, on appelait la Secrétairerie d'État aussi le Secrétariat papal). Les autres compétences — examen des lois particulières et des décrets généraux (exécutoires) — pourraient être transférées à la Signature Apostolique. Ce dernier est souvent comparé à une Cour de Cassation et à un Conseil d'État comme on les trouve dans les modèles de droit européens⁵⁰. Normalement, un tel Conseil d'État

⁵⁰ Z. GROCHOLEWSKI, « I tribunali », dans P. A. BONNET et C. GULLO (dir.), *La Curia Romana nella Cost. Ap. « Pastor Bonus »*, Cité du Vatican, Libreria Editrice Vaticana, 1990, 403.

est le tribunal administratif suprême dans une juridiction déterminée et exerce une compétence double : d'une part, le Conseil d'État se prononce sur les affaires administratives (comme le fait la Signature Apostolique) par la section « administration », d'autre part, le Conseil d'État donne un avis au sujet des projets de loi ou autres documents juridiques par la section « législation ». La réforme de la Signature Apostolique serait complète si cette compétence, aujourd'hui confiée au Conseil Pontifical pour les Textes Législatifs, était transférée à une section « législation » auprès de la Signature Apostolique.

Plus important encore est l'accès des fidèles aux tribunaux apostoliques. En pratique, cet accès est souvent limité, sinon totalement éliminé, à raison des frais juridiques à payer aux tribunaux apostoliques et des honoraires des avocats accrédités pour représenter des parties auprès des tribunaux apostoliques. De cette façon, un monopole professionnel est créé, ce qui risque d'empêcher les fidèles de présenter leur cause devant le tribunal apostolique compétent, uniquement parce qu'ils ne sont pas capables de payer les frais juridiques et les honoraires. En outre, il y a parfois un problème de communication, car les avocats accrédités ne sont pas toujours capables de s'exprimer dans les langues usuelles. Ce système devrait être revu pour que l'accès des fidèles aux tribunaux apostoliques et donc la protection de leurs droits, soient garantis. Dans son discours à l'occasion de l'inauguration de l'année judiciaire du Tribunal de la Rote Romaine, le 23 janvier 2015, le Pape François a évoqué le canon 1490 du Code de droit canonique et l'article 113 de *Dignitas connubii*. Les deux normes encouragent la constitution de défenseurs stables, rémunérés par le tribunal lui-même, pour exercer la charge d'avocat ou de procureur, surtout dans les causes matrimoniales.

En souhaitant que ces figures soient présentes dans chaque tribunal, en vue de favoriser un accès réel de tous les fidèles à la justice de l'Église, j'ai le plaisir de souligner qu'un nombre important de procès de la Rote romaine sont effectués gratuitement en faveur des parties qui, en raison des conditions économiques précaires dans lesquelles elles se trouvent, ne sont pas en mesure de se procurer un avocat. Cela est un point que je désire souligner : les sacrements sont gratuits. Les sacrements nous donnent la grâce. Et un procès matrimonial touche le sacrement du mariage. Je voudrais tant que tous les procès soient gratuits ⁵¹ !

⁵¹ FRANÇOIS, Discours à l'occasion de l'inauguration de l'année judiciaire du Tribunal de la Rote romaine, 23 janvier 2015, dans *L'Osservatore Romano. Édition quotidienne italienne*, 155/18 (24 janvier 2015), 7 : « Nell'auspicare che in ogni Tribunale siano presenti queste figure, per favorire un reale accesso di tutti i fedeli alla giustizia della Chiesa, mi piace sottolineare che un rilevante numero di cause presso la Rota Romana sono di gratuito patrocinio a favore di parti che, per le disagiate condizioni economiche in cui versano, non sono

Les mêmes principes devraient être appliqués généreusement aux tribunaux apostoliques. En même temps, un examen des frais juridiques et des honoraires devrait être entrepris.

3.1.3 – *Relation entre Congrégations et Conseils pontificaux*

Une des réformes inachevées de *Pastor bonus* est le lien entre les Congrégations et les Conseils pontificaux. Bien que *Pastor bonus* ne se prononce pas là-dessus, il avait été proposé d'associer chaque Conseil pontifical de manière stable avec une Congrégation⁵². Cela aurait été logique. Alors que le Conseil pontifical pour l'unité des chrétiens « a pour fonction de s'engager, par le moyen d'initiatives et d'activités opportunes, dans la tâche œcuménique de rétablir l'unité entre les chrétiens, » (cf. art. 135 PB) quand il faut agir et restaurer l'unité dans un cas concret, il revient à la Congrégation pour la Doctrine de la Foi de prendre des initiatives et d'agir, comme on l'a vu avec la constitution apostolique *Anglicanorum coetibus* pour ceux qui quittent l'Église anglicane et font profession de foi catholique⁵³. Il serait donc judicieux de mettre le Conseil pontifical pour la promotion de l'unité des chrétiens dans une relation plus étroite avec la Congrégation pour la Doctrine de la Foi, ou même aller jusqu'à créer la même position pour le Conseil pontifical pour l'unité des chrétiens que celle de la Commission pontificale *Ecclesia Dei* pour ceux qui voulaient quitter le schisme causé par Mgr Lefebvre. La même chose pourrait être faite pour d'autres Conseils pontificaux qui sont en relation étroite avec les autres Congrégations. Une telle initiative garantirait une meilleure collaboration entre les différents dicastères par des liens institutionnels.

3.1.4 – *Composition des dicastères*

En ce qui concerne la direction et la composition des dicastères, il a été récemment suggéré de nommer davantage d'évêques diocésains comme

in grado di procurarsi un avvocato. E questo è un punto che voglio sottolineare : i Sacramenti sono gratuiti. I Sacramenti ci danno la grazia. E un processo matrimoniale tocca il Sacramento del matrimonio. Quanto vorrei che tutti i processi fossero gratuiti » ! Traduction française de *L'Osservatore Romano*. Édition hebdomadaire en langue française, 66/6 (5 février 2015), 7.

⁵² Cf., à un certain degré, PROVOST, « *Pastor bonus* : Reflections on the Reorganization of the Roman Curia », 499-535, en particulier quand il fait allusion au 1985 *Schema Legis Peculiaris de Curia Romana*.

⁵³ BENOÎT XVI, constitution apostolique *Anglicanorum coetibus*, 4 novembre 2009, dans AAS, 101 (2009), 985-990.

membres des dicastères de la Curie romaine, et moins d'évêques issus de la curie. Bien que cela puisse être bon pour obtenir des expériences diverses dans chacun des dicastères, il faut aussi garder à l'esprit que les Congrégations — ces dicastères exerçant le pouvoir exécutif — doivent prendre des décisions dans les cas de recours hiérarchiques. Une situation délicate pourrait être créée quand un évêque diocésain est membre d'une congrégation qui doit entendre un recours hiérarchique contre lui. Cette situation peut mettre en péril le principe d'impartialité, ou, pour le dire par un aphorisme souvent cité : « La justice ne doit pas seulement être rendue, elle doit aussi être perçue comme telle. »

N'oublions pas que Paul VI avait déjà facilité la nomination d'évêques diocésains comme membres de dicastères avec son motu proprio *Pro comperto sane*⁵⁴. Les provisions de ce motu proprio ont été élargies et incluses dans la constitution apostolique *Pastor bonus*, en particulier dans l'article 3 §1 :

Les dicastères, à moins qu'en raison de leur nature particulière ou d'une loi spéciale ils aient une structure différente, sont composés du cardinal préfet ou d'un archevêque président, de l'Assemblée des Pères cardinaux et d'un certain nombre d'évêques, avec l'aide d'un secrétaire. En outre, y sont présents des consultants, et des ministres (*administri*) majeurs prêtent leur concours ainsi qu'un nombre approprié d'autres officiers (*officiales*).

Autrement dit : la suggestion ne doit pas être mise encore une fois dans un autre texte ; il suffit d'appliquer la législation en vigueur, en nommant des évêques diocésains comme membres de dicastères, toujours en tenant compte de leur compétence en la matière.

3.1.5 – Ordination épiscopale et Curie romaine

Certains ont remis en question la présence de tant d'évêques dans la Curie romaine. Bien qu'il ne soit probablement pas nécessaire d'élever chaque prélat à la dignité épiscopale, il est néanmoins important d'avoir une certaine présence épiscopale dans la Curie romaine. Quand les évêques diocésains ont à faire à des dicastères ou qu'ils viennent en visite *ad limina* à Rome, il est important qu'ils puissent parler d'évêque à évêque. De même, certains évêques diocésains vont refuser de répondre à des lettres envoyées par un fonctionnaire de la Curie romaine qui n'est pas un évêque. Ceci est important pour, entre autres choses, les recours hiérarchiques. On peut, cependant, se demander si tout ceux qui sont au service du Saint Siège, et en particulier de la Curie romaine, doivent ensuite être nommés évêques lorsqu'ils reviennent dans leur pays à la fin de leur service auprès du Saint-Siège.

⁵⁴ PAUL VI, motu proprio *Pro comperto sane*, 6 août 1967, dans AAS, 59 (1967), 881-884.

Au moins à deux occasions, le Pape François a écrit une lettre pour justifier l'élévation d'un prélat de la Curie romaine à la dignité épiscopale. Un premier message a été envoyé au Cardinal Bertello, Président du Gouvernorat de la Cité du Vatican à l'occasion de l'élévation du Secrétaire Général du Gouvernorat à la dignité épiscopale⁵⁵. Dans cette lettre, le Pape François écrit :

[I]l revient au Secrétaire Général du Gouvernorat d'assister directement à la formation humaine et chrétienne des employés et des collaborateurs ; de coordonner les prêtres en charge de l'assistance spirituelle qui sont présents dans divers domaines ; de promouvoir des initiatives appropriées en particulier en conjonction avec des programmes pastoraux de l'Église universelle et à des périodes importantes de l'année liturgique.

Voilà pourquoi François a décidé d'élever le Secrétaire Général à la dignité épiscopale. Bien sûr, il a donné un argument valable, mais il reste néanmoins à voir comment cette déclaration pourrait se réconcilier avec l'article 9 de la constitution apostolique *Ecclesia in Urbe*, selon lequel le Vicaire Général de la Cité du Vatican est responsable pour les fidèles dans ce territoire⁵⁶. Quelques mois plus tard, un message similaire a été envoyé au Cardinal Baldisseri, secrétaire général du Synode des Évêques, à l'occasion de l'élévation à la dignité épiscopale de son sous-secrétaire⁵⁷. Le Pape François écrit :

[D]ans le but de rendre plus manifeste le service apprécié que cet organisme accomplit en faveur de la collégialité épiscopale avec l'Évêque de Rome, j'ai décidé de conférer au sous-secrétaire la dignité épiscopale.

De cette manière, le sous-secrétaire, déjà dans sa tâche de collaboration avec Votre Éminence en ce qui concerne le développement de l'activité synodale, en vertu de l'ordre épiscopal reflétera cette communion affective et effective qui constitue l'objectif spécifique du synode des évêques. Également en coordonnant le travail interne du secrétariat général, le sous-secrétaire sera appelé à exprimer la réalité féconde et fructueuse qui naît de la participation

⁵⁵ FRANÇOIS, message au Président du Gouvernorat de la Cité du Vatican à l'occasion de l'élévation à la dignité épiscopale du Secrétaire Général, 7 octobre 2013, dans *L'Osservatore Romano. Édition quotidienne italienne*, 153/237 (16 octobre 2013), 8.

⁵⁶ JEAN-PAUL II, constitution apostolique *Ecclesia in Urbe*, 1 janvier 1988, dans AAS, 90 (1998), 177-193. Article 9 : « Intra Romanae Dioecesis fines, fideles qui in territorio Civitatis Vaticanae inveniuntur iurisdictioni Archipresbyteri pro tempore Basilicae Vaticanae sunt obnoxii, qui est Noster Vicarius Generalis pro Civitate Vaticana ». Également JEAN-PAUL II, chirographe *Dopo la costituzione*, 14 janvier 1991, dans AAS, 83 (1991), 147-148.

⁵⁷ FRANÇOIS, lettre au Secrétaire Général du Synode des Évêques, le cardinal Lorenzo Baldisseri, à l'occasion de l'élévation à la dignité épiscopale de son Sous-secrétaire, Mgr Fabio Fabene, 1 avril 2014, dans *L'Osservatore Romano. Édition hebdomadaire en anglais*, 47/15 (11 avril 2014), 15.

au *munus* épiscopal, source de sanctification pour ceux qui l'entourent et fondement de la communion hiérarchique avec l'Évêque de Rome, chef du collège épiscopal, et avec les membres de ce même collège.

Une telle justification pourrait être bien fondée et pourrait être très puissante, précisément dans le cas du sous-secrétaire du Synode des Évêques, mais il faut se demander si une telle justification est vraiment nécessaire pour des nominations épiscopales au sein de la Curie romaine.

3.1.6 – Lien entre le Saint Père et certains dicastères

Jusqu'à la réforme curiale de Paul VI, le Souverain Pontife était Préfet de trois Congrégations : la Sacrée Congrégation du Saint-Office (aujourd'hui la Congrégation pour la Doctrine de la Foi), la Sacrée Congrégation Consistoriale (aujourd'hui la Congrégation pour les Évêques), et la Sacrée Congrégation pour la Propagation de la Foi (aujourd'hui la Congrégation pour l'Évangélisation des Peuples). Le Cardinal-Secrétaire de chacune de ces Congrégations gérait les affaires quotidiennes.

Compte tenu de l'importance de la Congrégation pour la Doctrine de la Foi, il pourrait être sage de penser à un retour à la situation antérieure, et de faire de nouveau du Pape le Préfet de cette Congrégation. Un tel changement pourrait souligner l'importance singulière de cette Congrégation dans la vie de l'Église, et son rôle centrale dans la Curie romaine.

3.1.7 – La communication de la Bonne Nouvelle

Un des éléments clés de la nouvelle évangélisation est une bonne communication. Le législateur a souligné l'importance de communication et des moyens de communication sociale dans le Code de droit canonique de 1983⁵⁸. Il est évident que le système de communication du Saint-Siège pourrait être amélioré. Tout d'abord, les structures devraient être uniformisées. La Secrétairerie d'État assure la publication des actes et documents publics du Saint-Siège dans le bulletin *Acta Apostolicae Sedis*, supervise la Salle de presse du Saint-Siège, et exerce une vigilance sur *L'Osservatore Romano*, la Radio Vaticane, et le Centre de télévision du Vatican (cf. art. 43 PB). La Typographie polyglotte vaticane et la *Libreria Editrice Vaticana* dépendent aussi de la Secrétairerie d'État (cf. art. 191). Le Conseil Pontifical pour les Communications Sociales quant à elle « s'occupe des questions intéressant les moyens de communication sociale, afin que, par leur intermédiaire aussi,

⁵⁸ Avec une référence particulière aux canons 822-832 du Code de droit canonique de 1983.

le message de salut et le progrès humain puissent contribuer au progrès de la civilisation et des mœurs » (cf. art. 169 §1 PB). Néanmoins, ce Conseil, dans l'accomplissement de ses fonctions, « doit procéder en étroite liaison avec la Secrétairerie d'État » (cf. art. 169 §2 PB).

Nous pourrions rappeler l'intérêt des médias de partout dans le monde aux évènements qui entouraient la succession du pape de 2005 et celle de 2013. C'était un temps fort de conférences de presse, mais, malheureusement, l'information communiquée n'était pas toujours très précise et parfois même contradictoire. Ceci est un exemple d'un domaine où on peut améliorer la communication et où la collaboration entre les divers acteurs est très importante.

La réforme des structures financières du Saint-Siège et du Vatican était assez facile et simple. La réforme des départements de communications sociales du Saint-Siège ne sera pas aussi facile ; néanmoins elle est cruciale, en particulier parce que la communication est un moyen-clé pour la nouvelle évangélisation. L'érection du nouveau Secrétariat pour la Communication avec le motu proprio *L'attuale contesto comunicativo* du 27 juin 2015 semble être une bonne évolution⁵⁹. Le Conseil pontifical pour les Communications Sociales, la Salle de presse du Saint-Siège, le Service internet du Vatican, la Radio Vaticane, le Centre de télévision vaticane, *L'Osservatore Romano*, la Typographie polyglotte vaticane, le service photographique, et la *Libreria Editrice Vaticana* seront regroupés dans ce nouveau dicastère de la Curie romaine. La terminologie utilisée par le motu proprio est : « dans les délais établis », mais sans mentionner les délais. Cela ressemble plutôt à un gouvernement par annonces, mais n'a rien à voir avec une bonne technique de législation et risque de créer plus de confusion et de chaos.

3.2 — Décentralisation ?

Une des suggestions les plus entendus pour une réforme de la Curie romaine est un appel en faveur de la décentralisation. Certains l'ont appelée pas toujours avec justesse une application du principe de subsidiarité. Dans son exhortation apostolique *Evangelii gaudium*, le Pape François mentionnait cette décentralisation :

Mais j'ai renoncé à traiter de façon détaillée ces multiples questions qui doivent être l'objet d'étude et d'approfondissement attentif. Je ne crois pas non plus qu'on doive attendre du magistère papal une parole définitive ou complète sur toutes les questions qui concernent l'Église et le monde. Il n'est

⁵⁹ FRANÇOIS, motu proprio *L'attuale contesto comunicativo*, 27 juin 2015, dans *L'Osservatore Romano*. Édition quotidienne italienne, 155/145 (28 juin 2015), 6.

pas opportun que le Pape remplace les Épisopats locaux dans le discernement de toutes les problématiques qui se présentent sur leurs territoires. En ce sens, je sens la nécessité de progresser dans une “décentralisation” salutaire⁶⁰.

Certains ont lu dans ces paroles un appel à une simple décentralisation, tandis que François la qualifiait de salutaire. Un appel à une décentralisation linéaire pourrait bien être contre-productif. Trois exemples peuvent clarifier ce point.

Certains évêques européens ont suggéré d'éliminer tout recours à Rome et de garder la résolution des conflits au niveau diocésain. Il est cependant important de garder à l'esprit que, avant la réforme de la Curie romaine de 1908, les décisions administratives — ou les décisions prises en vertu du pouvoir exécutif — pouvaient être objets d'appel à un juge ou à un tribunal, éventuellement à la Rote romaine. C'est ce qu'on appelait l'*appellatio extrajudicialis* ou l'appel extrajudiciaire. La constitution apostolique *Sapientia consilio* et en particulier l'article 16 de la *Lex propria* de la Rote romaine et la Signature Apostolique ont formellement abrogé cet appel extrajudiciaire et ont précisé que l'appel contre les décisions des Ordinaires qui ne sont pas des décisions judiciaires seraient désormais jugés par les congrégations romaines et non plus par la Rote romaine⁶¹. Le modèle de la « juridiction unique » a donc été remplacé par le modèle d'un « juge-supérieur »⁶². La décision n'a pas été reçue de tout cœur par les canonistes, parce que la protection des droits au sein de l'Église a été sévèrement diminuée par une telle décision. Le système actuel de recours hiérarchique, tel que décrit dans le Code de droit canonique et dans une loi spéciale, même s'il n'est pas parfait, est un bon système pour la protection des droits. Si le recours hiérarchique au Saint-Siège était limité ou complètement aboli, la protection des droits des fidèles en souffrirait sévèrement. En outre, le message qui serait véhiculé par cette décision ne serait pas très prophétique : il pourrait donner l'impression que les décisions découlant du pouvoir exécutif des évêques sont si faibles qu'elles ne peuvent pas faire l'objet d'un recours hiérarchique de crainte d'être renversées. Si une décision au niveau local est solide et bien ancrée dans le droit, elle survivra à une procédure de recours hiérarchique.

⁶⁰ *Evangelii gaudium*, no. 16.

⁶¹ Canon 16 *Lex propria* : « Contra dispositiones Ordinarium, quae non sint sententiae formae iudiciali latae, non datur appellatio seu recursus ad Sacram Rotam ; sed earum cognitio Sacris Congregationibus reservatur ». Le texte est repris presque littéralement dans le canon 1601 du Code de droit canonique de 1917 : « Contra Ordinariorum decreta non datur appellatio seu recursus ad Sacram Rotam ; sed de eiusmodi recursibus exclusive cognoscunt Sacrae Congregationes ».

⁶² I. GORDON, « De iustitia administrativa ecclesiastica, tum transacto tempore tum hodierno », dans *Periodica*, 61 (1972), 280.

Le rôle des dicastères dans un tel recours est d'évaluer les décisions, en particulier du point de vue de la loi et de la substance. Le rôle des dicastères n'est pas d'abord de plaire aux évêques et aux autres supérieurs hiérarchiques, mais de juger chaque cas de manière objective, fondée sur le droit tout en gardant à l'esprit le bien du peuple et le salut des âmes⁶³.

Un deuxième exemple vient du droit liturgique. Comme nous le savons,

Il revient au Siège Apostolique d'organiser la sainte liturgie de l'Église tout entière, d'éditer les livres liturgiques, de reconnaître leurs traductions en langues vernaculaires et de veiller à ce que les règles liturgiques soient fidèlement observées partout⁶⁴.

Également,

Il appartient aux conférences des Évêques de préparer les traductions des livres liturgiques en langues vernaculaires, en les adaptant de manière appropriée dans les limites fixées par ces livres liturgiques, et de les publier après reconnaissance par le Saint-Siège⁶⁵.

Certains ont suggéré d'abandonner l'exigence de la *recognitio* des livres liturgiques par le Saint-Siège, et d'en laisser la décision entièrement à la discrétion des conférences épiscopales. Bien que cela pourrait sembler une mesure populaire et acceptable par tous, une telle décision risquerait de couper les liens entre l'Église universelle et les Églises particulières.

La période suivant Vatican II a été caractérisée par un appel à la décentralisation, incluant en droit pénal. L'accent était mis sur l'autorité et la discrétion des évêques locaux. Dans les cas d'inconduite de la part des clercs, une approche pastorale a été préférée à des procédures canoniques formelles, ces dernières étant jugées anachroniques. Quand le Code de droit canonique de 1983 a été promulgué, le canon 1395 § 2 traitait du délit, connu dans le monde civil comme l'abus sexuel des mineurs par des clercs : « Le clerc qui a commis d'une autre façon un délit contre le sixième commandement du Décalogue,

⁶³ Pour un aperçu du système des recours hiérarchiques et les fondations et origines du système actuel, voir e.g. K. MARTENS, « The Exercise of Vigilance and Supervision », dans J. WROCEŃSKI et M. STOKŁOSA (dir.), *La funziona amministrativa nell'ordinamento canonico. Administrative Function in Canon Law. Administracja w prawie kanonicznym. Congresso internazionale di diritto canonico. International Congress of Canon Law. Międzynarodowy kongres prawa kanonicznego. Warszawa, 14-18 settembre 2011*, Varsovie, Uniwersytet Kardynała Stefana Wyszyńskiego, 2012, 709-748.

⁶⁴ C. 838 § 2 : « Apostolicae Sedis est sacram liturgiam Ecclesiae universae ordinare, libros liturgicos edere eorumque versiones in linguas vernaculas recognoscere, necnon advigilare ut ordinationes liturgicae ubique fideliter observentur ».

⁶⁵ C. 838 § 3 : « Ad Episcoporum conferentias spectat versiones librorum liturgicorum in linguas vernaculas, convenienter intra limites in ipsis libris liturgicis definitos aptatas, parare, easque edere, praevia recognitione Sanctae Sedis ».

si vraiment le délit a été commis par violence ou avec menaces ou publiquement, ou bien avec un mineur de moins de seize ans, sera puni de justes peines, y compris, si le cas l'exige, le renvoi de l'état clérical »⁶⁶. La présomption était que des procès canoniques devaient avoir lieu dans les diocèses, avec la possibilité d'un appel à la Rote romaine contre les décisions judiciaires et un recours administratif à la Congrégation pour le Clergé contre les décrets administratifs pénaux. L'approche décentralisée n'était pas un grand succès. Il y avait également beaucoup de confusion par rapport à la législation en vigueur. En particulier, certains ont fait valoir que l'instruction du Saint-Office *Crimen sollicitationis* était encore en vigueur, tandis que d'autres ont affirmé que le nouveau Code avait abrogé l'instruction⁶⁷. Le motu proprio *Sacramentorum sanctitatis tutela* sur les délits les plus graves du 30 avril 2001⁶⁸, devait offrir une solution pour cette *lacuna legis* présumée et voulait rassembler tous les délits réservés à la Congrégation pour la Doctrine de la Foi — y compris le délit se trouvant au canon 1395 §2 — dans un seul texte⁶⁹.

A-t-on besoin de plus de décentralisation ? Ce n'est pas sûr. En effet, l'exemple historique des abus sexuels a montré en particulier que la surveillance dans la plupart des domaines est non seulement souhaitée, mais absolument nécessaire. Il revient ultérieurement à la question soulevée au premier ou deuxième siècle par le poète romain Juvénal : *Quis custodiet ipsos custodes ?* (Juvenal, *Satires*, Satire VI, 346-348). Qui va surveiller les gardiens ? Et à la limite : qui fera respecter la loi ?

3.3 — Nominations

Dans une tentative pour résoudre les problèmes à l'Institut pour les Œuvres de Religion (IOR) — la Banque du Vatican — le pape François a

⁶⁶ C. 1395 § 2 : « Clericus qui aliter contra sextum Decalogi praeceptum deliquerit, si quidem delictum vi vel minis vel publice vel cum minore infra aetatem sedecim annorum patratum sit, iustis poenis puniatur, non exclusa, si casus ferat, dimissione e statu clericali ».

⁶⁷ J.P. KIMES, « Considerazioni generali sulla riforma legislativa del motu proprio *Sacramentorum sanctitatis tutela* », 11. À propos de *Crimen sollicitationis*, également J.P. BEAL, « The 1962 Instruction *Crimen sollicitationis* : Caught Red-handed or Handed a Red Herring ? », dans *Studia canonica*, 41 (2007), 199-236.

⁶⁸ JEAN-PAUL II, motu proprio *Sacramentorum sanctitatis tutela*, 30 avril 2001, dans AAS, 93 (2001), 737-739 ; CONGRÉGATION POUR LA DOCTRINE DE LA FOI, *Epistula a Congregatione pro Doctrina Fidei missa ad totius Catholicae Ecclesiae Episcopos aliosque Ordinarios et Hierarchas interesse habentes de delictis gravioribus eidem Congregationi pro Doctrina Fidei reservatis*, 18 mai 2001, dans AAS, 93 (2001), 785-788 ; CONGRÉGATION POUR LA DOCTRINE DE LA FOI, *Normae de gravioribus delictis*, 21 mai 2010, dans AAS, 102 (2010), 419-430.

⁶⁹ KIMES, 12.

nommé le 15 juin 2013, Mgr Battista Mario Salvatore Ricca prélat *ad intérim* de l'Institut. Presque immédiatement après cette nomination, des rapports circulaient sur le passé trouble du prélat. Mgr. Ricca a été accusé d'avoir eu une relation inappropriée avec un homme au moment de servir à la Nonciature apostolique de Montevideo, en Uruguay, de 1999 à 2004. Le Nonce apostolique aurait déposé un rapport détaillé auprès du Secrétariat d'État. Lorsqu'il a été confronté à une question sur ce sujet lors de la conférence de presse impromptue à bord de l'avion qui le ramenait des JMJ de Rio de Janeiro à Rome, le Pape François a répondu que l'enquête préliminaire avait été faite telle que requise par le droit canonique, et qu'il n'y eut rien de révélé à ce sujet. Le pape a ajouté que de nombreuses fois dans l'Église, et non seulement dans ce cas, les gens cherchent des « péchés de jeunesse » pour ensuite les publier, même si ce ne sont pas des crimes. Bien que cela soit certainement vrai, il y a autre chose qui est plus inquiétant : si en effet un nonce apostolique a envoyé un rapport sur le comportement de l'un des diplomates en poste à cette mission diplomatique particulière, et ce rapport n'est apparemment pas là, qui a ensuite fait disparaître ce rapport ? Pourquoi cela n'a-t-il pas été abordé au cours de l'enquête préalable à la nomination ?

Le véritable défi pour toute réforme de la Curie romaine n'est pas de savoir s'il faut écrire une nouvelle constitution apostolique ou encore affirmer une fois de plus les principes connus de longue date, mais sur la façon d'appliquer les règles existantes et, surtout, comment sélectionner le personnel adéquat pour les différentes positions. Il faut non seulement avoir les personnes les mieux formées et les mieux éduquées, mais le personnel travaillant à la Curie romaine doit également avoir eu et avoir toujours un comportement impeccable, presque comme Eliot Ness et son équipe dans le film *Les Incorruptibles* (*The Untouchables*). En outre, le principe *promoveatur ut amoveatur* doit être entièrement abandonné pour des nominations dans la Curie romaine, à tous les niveaux. Ce principe s'est avéré extrêmement nuisible dans divers contextes.

3.4 — Responsabilité

Tout d'abord, il y a la responsabilité de ces évêques qui ont eux-mêmes commis des actes d'abus sexuels. Comment punir un évêque qui a été trouvé coupable de ces actes ? La question semble simple, la réponse l'est moins. En mars 2013, Keith Michael cardinal O'Brien, archevêque émérite de Saint Andrews and Edinburgh (Écosse), ne participait pas au conclave pour élire le successeur de Benoît XVI, officiellement pour des raisons

personnelles acceptées comme telles par le Collège des Cardinaux⁷⁰, mais en fait c'était en raison d'allégations de conduite inappropriée. Le Code de droit canonique ne précise pas les conditions pour perdre la dignité cardinalice. Néanmoins, dans la constitution apostolique *Universi Dominici gregis*, le législateur a stipulé qu'un cardinal qui a été canoniquement déposé ou qui a démissionné, avec le consentement du Pontife Romain, de la dignité cardinalice, ne jouit plus du droit d'élire le Pape⁷¹. Le dernier cardinal à avoir démissionné de la dignité cardinalice était le Jésuite français, Louis Billot, S.J. (1846-1931)⁷². Au cours de l'histoire, on peut retrouver régulièrement des démissions de la dignité cardinalice pour des raisons dynastiques. Pour un exemple d'un cardinal qui a été déposé, il faut retourner au seizième siècle : le Cardinal Odet de Coligny de Châtillon (1517-1571) a été déclaré hérétique par Pie IV au cours du consistoire secret du 31 mars 1563 après sa conversion au calvinisme, pour être privé de tous ses bénéfices épiscopaux et cardinalices par la suite⁷³. Le Cardinal Alfonso Petrucci (1491-1517) a voulu empoisonner Léon X (1513-1521), mais la conspiration a été éventée ; le Cardinal était déposé canoniquement et exécuté quelques semaines plus tard⁷⁴. Si les accusations contre Keith Michael cardinal O'Brien étaient prouvées, ne serait-il pas possible que le Pape lui

⁷⁰ « Nella Cappella Sistina saranno 115 i cardinali elettori », dans *L'Osservatore Romano. Édition quotidienne italienne*, 153/57 (9 mars 2013), 1 : « La settima congregazione generale dei cardinali ha avuto luogo nella mattina di venerdì 8 marzo, nell'Aula del Sinodo. Ai lavori, svoltisi tra le 9.30 e le 12.30, hanno partecipato 153 porporati, tra i quali tutti i 115 elettori attesi sui 117 aventi diritto : non erano presenti, infatti, i cardinali Darmaatmadja e O'Brien. All'inizio della congregazione si è provveduto a riconoscere i motivi di assenza dei due porporati. In ottemperanza al numero 38 della *Universi dominici gregis*, il collegio cardinalizio ha votato l'accettazione dei motivi — di salute, nel primo caso, e personali, nel secondo — che ne impediscono la partecipazione ».

⁷¹ JEAN-PAUL II, constitution apostolique *Universi Dominici gregis*, 22 février 1996, dans AAS, 88 (1996), 305-343, ci-après cité comme UDG, suivi par le numéro de l'article ou du paragraphe. Ici UDG 36 : « Un Cardinal de la Sainte Église Romaine qui a été créé et dont la nomination a été publiée en Consistoire, a, par là-même, le droit d'élire le Pontife selon la norme du n. 33 de la présente Constitution, même si la barrette ne lui a pas encore été imposée, si l'anneau ne lui pas été remis et s'il n'a pas prêté serment. Au contraire, *ne jouissent pas de ce droit les Cardinaux canoniquement déposés ou ceux qui ont démissionné, avec le consentement du Pontife Romain, de la dignité cardinalice*. De plus, pendant la vacance du Siège, le Collège des Cardinaux ne peut ni les réadmettre ni les réhabiliter ». (notre accentuation)

⁷² J. BITTREMIEUX, « Le R.P. Louis Billot », dans *Ephemerides Theologicae Lovanienses*, 9 (1932), 292-295 ; H. LE FLOCH, *Le Cardinal Billot, lumière de la théologie*, Paris : Beauchesne, 1947.

⁷³ A. ROSSI, *Il Collegio Cardinalizio*, Cité du Vatican, Libreria Editrice Vaticana, 1990, 32.

⁷⁴ F. WINSPEARE, *La congiura dei cardinali contro Leone X*, Biblioteca dell'Archivio storico italiano 5, Florence, Olschki, 1957.

impose une peine canonique en lui retirant la dignité cardinalice ? Une réponse à cette question a été donnée vendredi, le 20 mars 2015, quand la Salle de Presse du Saint-Siège a publié une déclaration au nom du Doyen du Collège des Cardinaux :

Le Saint-Père a accepté la démission des droits et privilèges d'un cardinal, exprimés dans les canons 349, 353 et 356 du Code de droit canonique, présentée par le cardinal Keith Michael Patrick O'Brien, archevêque émérite de Saint Andrews et Édinburgh, après une longue période de prière. Avec cette disposition, Sa Sainteté souhaite manifester sa sollicitude pastorale à tous les fidèles de l'Église en Écosse et à les encourager à poursuivre avec espoir le chemin du renouveau et de la réconciliation⁷⁵.

Une lecture attentive de la déclaration suggère que le Cardinal O'Brien a abandonné tous les droits et privilèges liés à la dignité cardinalice, mais qu'il reste membre du Collège des Cardinaux. La déclaration suggère également qu'il a démissionné lui-même ; une peine canonique n'a pas été imposée. Si ses actions immorales ont en effet eu lieu et si elles sont prouvées, pourquoi laisser l'initiative à l'offenseur ? Pourquoi ne pas imposer une peine canonique pour réparer le scandale, rétablir la justice, et amender le coupable (cf. can. 1341) ?

Une question encore plus difficile est la responsabilité des évêques qui n'ont pas réagi de façon approprié à des charges d'abus sexuels contre leurs clercs. Lors de la dixième réunion du Conseil des cardinaux, qui s'est déroulée à la maison Sainte-Marthe du 8 au 10 juin 2015,

il a été établi que les dénonciations d'abus impliquant la charge épiscopale seront transmises à la Congrégation pour les Évêques, à celle pour l'Évangélisation des peuples ou à celle pour les Églises orientales, sur la base de leurs compétences respectives. En second lieu, il a été établi que le Pape charge la Congrégation pour la Doctrine de la Foi de juger les évêques en ce qui concerne les délits d'abus de charge et que le Pape, après avoir consulté le Préfet, autorise également l'institution d'une nouvelle section judiciaire au sein de la même Congrégation, ainsi que la nomination d'un personnel stable qui y prêtera service. Pour rendre plus efficaces ces

⁷⁵ Déclaration par le Doyen du Collège des Cardinaux. Renouveau pour l'Église en Écosse, dans *L'Osservatore Romano. Édition hebdomadaire en anglais*, 48/13 (27 mars 2015), 2 : « The Holy Father has accepted the resignation of the rights and privileges of a Cardinal, expressed in canons 349, 353 and 356 of the Code of Canon Law, presented by Cardinal Keith Michael Patrick O'Brien, Archbishop Emeritus of Saint Andrews and Edinburgh, after a long period of prayer. With this provision, His Holiness would like to manifest his pastoral solicitude to all the faithful of the Church in Scotland and to encourage them to continue with hope the path of renewal and reconciliation ». La version en italien a été publiée dans *L'Osservatore Romano. Édition quotidienne italienne*, 155/65 (20-21 mars 2015), 7.

décisions, la nomination d'un secrétaire qui assistera le Préfet dans la nouvelle section judiciaire a été proposée. On aura recours également au personnel de cette section pour les procès pénaux relatifs à l'abus des mineurs et des adultes vulnérables de la part du clergé. Il a été enfin établi que ces nouveautés seront évaluées au niveau opérationnel au cours des cinq prochaines années⁷⁶.

Cette évolution est sans doute bonne. Néanmoins, la mise en œuvre des décisions prises sur la proposition du Conseil des cardinaux ne sera pas facile. Prenons un exemple. Le 23 avril 2010, l'évêque de Bruges en Belgique a démissionné, en invoquant le canon 401 § 2, c'est-à-dire une démission pour cause grave, après qu'il eût admis avoir abusé de l'un de ses neveux pendant environ treize ans. Avant la démission, une réunion a eu lieu entre la victime, son oncle et Godfried cardinal Danneels, ancien archevêque de Malines-Bruxelles. Les deux prélats ne savaient pas que la conversation était enregistrée. L'enregistrement est désormais connu comme « the Danneels tapes ». L'ancien archevêque a initialement soutenu qu'il était seulement présent à la réunion pour écouter, et qu'il n'avait pas l'intention de mettre en place un cover-up. Lorsque l'enregistrement a été publié, il est devenu évident que l'archevêque avait tenté de convaincre le neveu de ne pas demander la démission de son oncle et d'attendre jusqu'à ce que ce dernier puisse normalement prendre sa retraite selon le droit. La conversation entre la victime et le cardinal s'envenime à ce moment-là, et le cardinal mentionne alors que l'évêque allait souffrir et qu'il allait être humilié s'il était contraint de démissionner avant d'avoir atteint l'âge de la retraite. La victime répond que son oncle, l'évêque, a détruit sa vie de famille. À la fin de la deuxième partie de la conversation, après que l'évêque et les autres membres de la famille s'y soient joints, l'évêque admet devant tous qu'il a détruit sa famille⁷⁷. Où donc est le renouvellement de la Curie romaine, lorsque le même cardinal Danneels, qui ne montrait aucune empathie envers la victime qui a vu détruire sa vie de famille, devient par nomination pontificale membre du synode extraordinaire sur la famille célébré en octobre 2014, et membre du synode ordinaire sur la famille célébré en octobre 2015 ? Quel message est alors envoyé ?

⁷⁶ « Nouvelle section judiciaire pour la protection des mineurs », *L'Osservatore Romano. Édition hebdomadaire en langue française*, 66/24 (11 juin 2015), 15. Curieusement, le motu proprio de juin 2016 ne fait plus mention de cette section judiciaire : FRANÇOIS, motu proprio *Come una madre amorevole*, 4 juin 2016, dans *L'Osservatore Romano. Édition hebdomadaire en langue française*, 67/23 (9 juin 2016), 21.

⁷⁷ *De Standaard*, August 28-29, 2010.

4 — *Un exemple pour une réforme au plan local et intermédiaire*

À la fin du pontificat de Benoît XVI, la Curie romaine a été au centre de l'attention en raison du scandale Vatileaks. L'impression a été donnée que la Curie était un lieu d'intrigues, de trahison et de scandale, et a besoin de nettoyage. Que penser des vœux de Noël de 2014 du Pape François à la Curie romaine⁷⁸ ? Peut-on vraiment penser que le Pape ne s'adressait qu'à la Curie romaine, ou a-t-il envoyé une invitation à chacun de nous pour examiner notre conscience et notre fonctionnement professionnel ? Bien que ce soit toujours un soulagement quand nous pouvons accuser les autres et signaler leurs erreurs, peut-être la réforme annoncée de la Curie romaine pourrait-elle être également un exemple pour une réforme aux niveaux local, diocésain et intermédiaires. Bien qu'il n'y ait peut-être pas de menace immédiate de scandales du genre Vatileaks à ces niveaux, une certaine forme d'auto-évaluation n'est jamais une mauvaise idée.

Conclusion

Winston Churchill, surtout connu pour être le Premier ministre du Royaume-Uni pendant la Seconde Guerre mondiale, est aussi connu, entre autres, pour sa célèbre expression sur l'histoire : « Ceux qui n'apprennent pas de l'histoire, sont condamnés à la répéter. » Quoi donc, le cas échéant, pouvons-nous apprendre des différentes réformes de la Curie dans le passé ? Les grandes réformes que nous avons mentionnées, se retrouvant dans un nouveau document complet, ont toutes été inspirées par un changement d'importance, à savoir le besoin perçu de spécialisation (1588), l'acceptation de la disparition des États pontificaux (1908), et Vatican II (1967 et 1988). Est-ce que le malaise causé par la façon dont certains ont exercé leur office curial par le passé est une raison suffisante pour changer toute la dynamique d'une organisation ?

La réforme proposée de la Curie romaine n'est pas nécessairement atteinte par la production d'une autre constitution apostolique, détaillant l'organigramme de ladite Curie romaine. Si la future réforme de la Curie romaine doit être au service de la nouvelle évangélisation, une telle réforme ne peut pas être en premier lieu une réécriture de la constitution apostolique *Pastor bonus* avec quelques réformes symboliques, tout en répétant ce qui est déjà

⁷⁸ FRANÇOIS, Vœux de Noël à la Curie romaine, 22 décembre 2014, dans *L'Osservatore Romano*. Édition hebdomadaire en langue française, 66/1 (1 janvier 2015), 7-9.

dans ladite constitution. Ce qui est nécessaire, à mon avis, est une véritable nouvelle attitude ; une attitude qui reflète l'esprit de service envers le Pontife romain, l'Église universelle et les Églises particulières, et non plus une attitude d'autopromotion de sa propre carrière, tel que dénoncée déjà, même en haut lieu. Dans ses vœux de Noël à la Curie romaine, en 2013, le Pape François a dit exactement la même chose en évoquant de façon éloquente les deux caractéristiques essentielles que chaque curialiste doit posséder, le professionnalisme et le service :

J'admire beaucoup ces Monseigneurs qui suivent le modèle des vieux Curialistes, personnes exemplaires. [...] Mais aujourd'hui aussi, nous en avons ! Des personnes qui travaillent avec compétence, avec précision, avec abnégation, accomplissant avec soin leur devoir quotidien. [...] Et ils sont un modèle, et de ce modèle et de ce témoignage, je tire les caractéristiques du membre de la Curie, et encore plus du Supérieur, que je voudrais souligner : la professionnalité et le service. La professionnalité, qui signifie compétence, étude, mise à jour. [...] C'est une qualité fondamentale pour travailler à la Curie. Naturellement la professionnalité se forme, et en partie aussi, s'acquiert ; mais je pense que, vraiment parce qu'elle se forme et parce qu'elle doit être acquise, il faut qu'il y ait dès le départ une bonne base. La seconde caractéristique est le service, service du Pape et des Évêques, de l'Église universelle et des Églises particulières. Dans la Curie Romaine on apprend, « on respire » de manière spéciale cette double dimension de l'Église, cette compénétration entre universel et particulier ; et je pense que c'est une des expériences les plus belles de celui qui vit et travaille à Rome : « sentir » l'Église de cette manière⁷⁹.

Un nouveau document n'est peut-être pas nécessaire, mais certainement un *novus habitus mentis*, de tel sorte que la Curie romaine puisse être véritablement prophétique et être un exemple pour tous, y compris pour les curies à d'autres niveaux. Sans cette compréhension fondamentale, toute réforme risque d'être perçue comme la scène du film épique *Titanic* de 1997, dirigé par James Cameron : les deux personnages principaux sont en train de danser alors que le navire est déjà en train de sombrer. Dans cette même scène, un maître d'hôtel met consciencieusement les chaises dans l'ordre, même si elles retombent presque immédiatement en raison de l'angle du navire en perdition. Sans aucun changement fondamental, le travail du maître d'hôtel est en vain. De même, la réforme de la Curie romaine ne doit pas se limiter à une réécriture de textes existants, ou à une répétition de ce qui est déjà dans la législation en faisant quelques changements cosmétiques. Une véritable réforme de la Curie romaine a besoin de ce *novus habitus mentis*, un véritable changement de mentalité, à l'égard d'un véritable esprit de service.

⁷⁹ FRANÇOIS, Vœux de Noël à la Curie romaine, 21 décembre 2013, dans *L'Osservatore Romano. Édition hebdomadaire en langue française*, 65/1 (2 janvier 2014), 8-9.

DE CONCORDIA INTER CODICES: A COMMENTARY

JOBE ABBASS, OFM CONV.*

SUMMARY — In his apostolic letter, *De concordia inter Codices*, given *motu proprio*, Pope Francis recognizes that the Latin and Eastern Codes have their own unique norms and that they remain mutually independent. However, for concrete pastoral reasons today, the pope is also concerned that an appropriate degree of harmony between the two Codes is necessary. To achieve this end, the *motu proprio* reformulates some Latin norms or adds others along the lines of the later Eastern Code. His Holiness is solicitous to do so for two specific reasons: 1) While recognizing the disciplinary peculiarities of various Churches that occur in a regional context, especially in the West, he seeks an equilibrium between safeguarding the law proper to the Eastern minority with the canonical tradition of the Latin majority; and 2) Even though the Codes generally apply only to the Catholic faithful, he aims to better define relations with the faithful of the non-Catholic Churches especially in regards to Catholic ministers' celebration of the sacraments of baptism and marriage for non-Catholic faithful under certain conditions. In this study, the author provides a commentary of the *motu proprio* from its preamble, to its eleven articles and Latin canons thereby affected, to its promulgation and entry into force.

RÉSUMÉ — Dans sa lettre apostolique, *De concordia inter Codices*, donnée sous forme de *motu proprio*, le pape François reconnaît que les Codes latin et oriental ont leurs propres normes respectives et qu'ils sont indépendants l'un de l'autre. Toutefois, pour des raisons pastorales concrètes auxquelles nous sommes confrontées aujourd'hui, le pape est également conscient qu'un degré d'harmonie entre les deux Codes est nécessaire. Pour y parvenir, le *motu proprio* reformule certains canons du Code latin ou en ajoute quelques-uns qui sont dans la même ligne que le Code oriental promulgué ultérieurement. Sa Sainteté désire ces changements pour deux raisons précises : 1) Tout en reconnaissant que les diverses Églises ont des

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particularités disciplinaires qui se trouvent dans les contextes régionaux, particulièrement en Occident, le pape cherche un juste équilibre entre la sauvegarde des lois propres à la minorité orientale et la tradition canonique de la majorité latine ; et 2) Même si, en général, les Codes s'appliquent seulement aux fidèles catholiques, le pape vise à mieux définir les relations avec les fidèles des Églises non-catholiques en particulier en ce qui concerne la célébration sous certaines conditions des sacrements du baptême et du mariage par des ministres catholiques pour des fidèles non-catholiques. Dans cette étude, l'auteur fournit un commentaire du *motu proprio* à partir de son préambule, ses onze articles et les canons latins ainsi touchés, jusqu'à sa promulgation et l'entrée en vigueur.

The Preamble

In the introductory clause to the Preamble of this *motu proprio*, Pope Francis expresses his “solicitude” to achieve a certain harmony between the *Codex Iuris Canonici* (CIC) and the *Codex Canonum Ecclesiarum Orientalium* (CCEO).¹ The use of the word “solicitude” immediately calls to mind the care the Legislator requires of diocesan bishops for all the Christian faithful entrusted to them. CIC canon 383 §1 states: “In exercising the function of a pastor, a diocesan bishop is to show himself concerned (*sollicitum*) for all the Christian faithful entrusted to his care, of whatever age, condition, or nationality they are, whether living in the territory or staying there temporarily....”.² With specific reference to Eastern Catholics entrusted to the care of Latin bishops, Pope John Paul II had also urged all ordinaries to share that same solicitude so that these faithful keep and observe their own rite wherever they are in the world. In presenting the new Eastern code to the twenty-eighth general congregation of the synod of bishops (October 25, 1990), His Holiness stated:

But it has always been the pressing desire of the supreme pontiffs that all these faithful, to use the words of Vatican Council II, “keep, follow and as far as possible observe their own rite everywhere in the world” (*OE* n.4). The Holy See, especially through the assiduous work of the very deserving Congregation for the Eastern Churches, has done and will do everything

¹ The writer’s translation of the Preamble to the *motu proprio* is attached as an Appendix to this article.

² Unless otherwise stated, English translations in this article for the CIC canons are taken from *Code of Canon Law, Latin-English Edition*, Washington, D.C., Canon Law Society of America, 1999. English translations for the CCEO canons are taken from *Code of Canons of the Eastern Churches, Latin-English Edition*, Washington, D.C., Canon Law Society of America, 2001.

possible so that these faithful find everywhere in the world situations that favor and support the desire just expressed, and it is also confident that all Ordinaries, to whose pastoral care they have been entrusted, will share this concern (*sollicitudinem*), aware that, by it, they are rendering an essential service to the universal Church and giving witness of their concern for what is most precious and congenial to man and, that is, to be able to live according to that natural disposition of the heart in which the Creator has placed him since the maternal womb, and that such action is truly in conformity with what the “*salus animarum*” requires.³

Soon after the promulgation of the Eastern Code, much study and debate began to be devoted to the extent of a Latin bishop’s duty of care towards Eastern Catholics entrusted to them and, particularly, their right to retain, cherish and observe their own rite. Regarding a Latin bishop’s degree of care, *CIC* canon 383 §2 stipulates: “If he has faithful of a different rite, he is to provide for their spiritual needs either through priests or parishes of the same rite or through an episcopal vicar.” However, in addition, *CCEO* canon 193 §1, which as no Latin counterpart, states:

The eparchial bishop to whose care the Christian faithful of another Church *sui iuris* have been committed is bound by the serious obligation of providing everything (*gravi obligatione tenetur omnia providendi*) so that these Christian faithful retain the rite of their respective Church, cherish and observe it as far as possible. He is also to ensure that they foster relations with the superior authority of their Church.

The question became whether or not a Latin bishop is bound by the same duty of care towards Easterners as Eastern bishops are towards other Easterners, and even Latin Catholics, entrusted to their care. Subsequently, the Pontifical Council for the Interpretation of Legislative Texts, as it was then called, acknowledged in 1999 that a question had been submitted for its own study concerning “certain observations regarding the relationship between Eastern canon 193 §1 and Latin canon 383 §2.”⁴

Certain authors argued that, even though the two Codes are integral parts of one *Corpus Iuris Canonici* of the universal Church, they are still mutually independent. Hence, a relationship cannot simply be drawn between them so as, for example, to impose the more serious obligation of Eastern canon 193 §1 also upon Latin bishops, who are already governed by Latin canon 383 §§1 and 2.⁵ It is true that, in the draft version of Eastern canon 193 §1, the

³ AAS, 83 (1991), 491.

⁴ *Comm*, 31 (1999), 50.

⁵ See: CARL G. FÜRST, “Zur Interdependenz von lateinischem und orientalischem Kirchenrecht: Einige Anmerkungen zum Kirchenrecht der katholischen Kirche,” in *Iuri Canonico Promovendo. Festschrift für Heribert Schmitz zum 65. Geburtstag*, WINFRIED AYMANS et al.,

qualifying phrase, *etiam Ecclesiae latinae* (“also of the Latin Church”), had immediately followed the opening words *episcopus eparchialis* (“eparchial bishop”), but that phrase was omitted by the Legislator himself during the last changes he made to the draft of the Eastern Code.⁶ On the other hand, other canonists have maintained that, despite the absence of the phrase *etiam Ecclesiae latinae* to qualify *episcopus eparchialis*, the more serious obligation in Eastern canon 193 §1 implicitly applies also to Latin bishops because of the nature of the matter (*ex natura rei*) and/or the very *ratio* that inspired this Eastern norm. They seem to argue that the Legislator may have omitted the phrase “even of the Latin Church” as unnecessary since all bishops, Eastern and Latin, have the serious obligation to provide everything so that the faithful can exercise their fundamental human right to retain and practice their own rite.⁷

The latter argument could well have drawn support from conference presentations made by Ivan Žužek, the Secretary of the *Pontificia Commissio Codici Iuris Canonici Orientalis Recognoscendo* (PCCICOR) and the relator of the of the *Coetus de S. Hierarchia* that drafted canon 193 §1. In the context of an international canon law congress (October 6-11, 1980) concerning the fundamental rights of Christians, Žužek referred to the sacred and essential right to preserve one’s rite. He stated:

On one hand, in fact, it is really a question concerning ecumenism but, on the other hand, one denies or questions the right these Churches have to exist, a right, however, which has priority among fundamental rights and which, for the individuals who are united to the Catholic Church, implies other essential rights, which point to the most sacred rights of people, for

(eds.), Regensburg: Pustet, 1995, 553; MARCO BROGI, “Il nuovo codice orientale e la Chiesa latina,” *Antonianum*, 66 (1991), 60, note 96; JOBE ABBASS, “Le ‘ultime modifiche’ al Codice di diritto canonico orientale,” in KURIAKOSE BHARANIKULANGARA, (ed.), *Il Diritto Canonico Orientale nell’ordinamento ecclesiale*, Vatican City, Libreria Editrice Vaticana, 1995, 226-230; IDEM, “Canonical Dispositions for the Care of Eastern Catholics outside their Territory,” *Periodica de re canonica*, 86 (1997), 330-346; IDEM, “Latin Bishops’ Duty of Care towards Eastern Catholics,” *StC* 35 (2001), 7-32 and IDEM, *The Eastern Code (Canon 1) and Its Application to the Latin Church*, Bangalore: Dharmaram Publications, 2014, 28-36.

⁶ See *Nuntia*, 31 (1990), 39 (c. 193 §1).

⁷ See MARCO BROGI, “Cura pastorale di fedeli di altra Chiesa *sui iuris*,” *Revista Española de Derecho Canonico*, 53 (1996), 124; LUIS OKULIK, “Tutela giuridica dell’identità ecclesiale dei fedeli orientali in situazione di diaspora,” in *Nuove terre e nuove Chiese: Le comunità di fedeli orientali in diaspora*, LUIS OKULIK (ed.), Venice: Marcianum Press, 2008, 231-232; and ORAZIO CONDORELLI, “Giurisdizione universale delle Chiese *sui iuris*? Tra passato e presente,” in *Cristiani orientali e pastori latini*, PABLO GEFAELL (ed.), Milan: Giuffrè Editore, 2012, 104, note 133.

they constitute their most intimate ‘me’, that is, the right to preserve their own Christian identity in which they have lived and grown up since their tenderest years, beginning with the first prayer learned on their own mothers’ laps.⁸

In a later conference (July, 1989) given to Italian canonists in view of the forthcoming promulgation of the new Eastern code, Žužek again treated the question of the identification of a people’s faith life and culture with their rite. He stated: “Certainly, just as all persons belong to a specific cultural area, so all baptized, from their family background, even from their mothers’ laps, belong to a specific *ritus*, that is, they are formed within the framework of a specific ‘patrimonium liturgicum, theologicum, spirituale et disciplinare.’ Thus, each *Ecclesia sui iuris* is entirely pregnated by its *ritus*, from its earliest roots to its most modern institutions.”⁹ Ivan Žužek’s thought was even echoed by Pope John Paul II at the time of the Eastern Code’s promulgation. In the apostolic constitution, *Sacri canones*, with which Pope John Paul II promulgated the Eastern Code, His Holiness stated: “Indeed, this Code protects the very fundamental right of the human person, namely, of professing the faith in whatever their rite, drawn to a great extent from the very womb of the mother, which is the rule of all ‘ecumenism’.”¹⁰

Given this background, the Preamble to this *motu proprio* does not state that the more serious obligation established in *CCEO* canon 193 §1 also applies to Latin bishops entrusted with the care of Eastern faithful. It is true that the pope further clarifies and elaborates upon the “solicitude” Latin bishops are to show to Eastern faithful entrusted to their care but he does not state that they are further bound by Eastern canon 193 §1 because of an underlying fundamental right of the faithful. Among the articles of the *motu proprio*, the Legislator does not qualify *CIC* canon 383 §§1-2 with *CCEO* canon 193 §1 nor does he add the unique Eastern norm to the Latin Code. Certainly, the Preamble intends to strengthen and characterize more precisely the solicitude Latin bishops are to have for Easterners entrusted to them but it does not impose on Latin bishops the grave obligation of providing everything so that these faithful are able to observe their own rite in all respects. Pope Francis states: “It needs to be remembered that Eastern

⁸ IVAN ŽUŽEK, “Observations à M. le Prof. Sobanski,” in *Les Droits Fondamentaux du Chrétien dans l’Église et dans la Société: Actes du IV Congrès International de Droit Canonique*, EUGENIO CORECCO et al. (eds.), Fribourg, Freiburg i. Br. and Milan: Editions Universitaires, Herder and Giuffrè, 1981, 742.

⁹ IVAN ŽUŽEK, “Presentazione del *Codex Canonum Ecclesiarum Orientalium*,” *ME*, 115 (1990), 121.

¹⁰ *AAS*, 82 (1990), 1035.

faithful are bound to observe their own rite wherever they are and, as a result, the competent ecclesiastical authority is to take care most earnestly that appropriate means are provided (*auctoritas ecclesiasticae competentis est maximopere curare ut congrua media apparentur*) them to be able to fulfill this obligation.”¹¹ On the other hand, regarding the serious duty of care placed on Eastern bishops entrusted with faithful of another Church *sui iuris*, including the Latin Church, the unique *CCEO* canon 193 §1 clearly establishes that a bishop has the grave obligation of providing everything (*gravi obligatione tenetur omnia providendi*) so that these faithful observe their own rite in all its respects.

As in the case of the relationship between *CCEO* canon 193 §1 and *CIC* canon 383 §§1-2, the Preamble is clear that the purpose of the *motu proprio* is not to harmonize all parallel provisions of the Codes although some might have expected more. Pope Francis acknowledges that the Codes have their distinct peculiarities and that they remain mutually independent. Still, the goal of the *motu proprio* is to harmonize at least some of the canons of the Latin Code to a great extent by reformulating or adding norms along the lines of the later Eastern Code. His Holiness was moved to do so for two specific reasons: 1) While recognizing the disciplinary peculiarities of various Churches that occur in a regional context, especially in the West, the Legislator seeks an equilibrium between safeguarding the law proper to the Eastern minority with the canonical tradition of the Latin majority; and 2) Even though the Codes generally apply only to the Catholic faithful, the *motu proprio* aims to better define relations with the faithful of the non-Catholic Churches especially in regards to Catholic ministers’ celebration of the sacraments of baptism and marriage for non-Catholic faithful under certain conditions.

The Articles

In the text that follows each of the articles of the *motu proprio*, a commentary is generally offered only regarding the changes, which appear in italics, that the Legislator has made to the canons concerned.

¹¹ The Latin text reads: “Speciatim est memorandum christifideles orientales ad suum cuiusque ritum servandum teneri, ubicumque terrarum inveniantur, ac proinde auctoritatis ecclesiasticae competentis est maximopere curare ut congrua media apparentur quibus ipsi hanc suam obligationem implere queant.” See http://w2.vatican.va/content/francesco/la/motu_proprio/documents/papa-francesco-motu-proprio_201605_de-concordia-inter-codices.html/

Art. 1.¹² The following text entirely takes the place of can. 111 of the Code of Canon Law, in which a new paragraph is added and some expressions are changed:

§1. Ecclesiae latinae per receptum baptismum adscribitur filius parentum, qui ad eam pertinent vel, si alteruter ad eam non pertineat, ambo concordi voluntate optaverint ut proles in Ecclesia latina baptizaretur; quodsi concors voluntas desit, *Ecclesiae sui iuris* ad quam pater pertinet adscribitur.

§2. *Si vero unus tantum ex parentibus sit catholicus, Ecclesiae ad quam hic parens catholicus pertinet adscribitur.*

§3. Quilibet baptizandus qui quantum decimum aetatis annum expleverit, libere potest eligere ut in Ecclesia latina vel in alia *Ecclesia sui iuris* baptizetur; quo in casu, ipse ad eam Ecclesiam pertinet quam elegerit.

§1. Through the reception of baptism, the child of parents who belong to the Latin Church is enrolled in it, or, if one or the other does not belong to it, both parents have by mutual agreement chosen to have their offspring baptized in the Latin Church. If there is no mutual agreement, the child is enrolled in the *Church sui iuris* to which the father belongs.

§2. *But if only one of the parents is Catholic, the child is enrolled in the Church to which the Catholic parent belongs.*

§3. Anyone to be baptized who has completed the fourteenth year of age can freely choose to be baptized in the Latin Church or in another *Church sui iuris*; in that case, the person belongs to the Church which he or she has chosen.

The first change made in §§ 1 and 3 of *CIC* canon 111 involves substituting the terms “rite” and “ritual”, formerly used here, with “Church *sui iuris*.” A rite has come to be defined as a multifaceted expression of a Church *sui iuris*. Indeed, *CCEO* canon 28 §1 states: “A rite is a liturgical, theological, spiritual and disciplinary heritage, differentiated by the culture and the circumstances of the history of peoples, which is expressed by each Church *sui iuris* in its own manner of living the faith.” However, the Latin Code (see, for example, cc. 214, 383 §2, 1015 §2) does continue to refer to a “rite” when perhaps it should also be changed to refer to the juridically recognizable and accepted expression “Church *sui iuris*.” This expression need not only refer to the Eastern Catholic Churches. According to the official Explanatory Note published (December 8, 2011) by the Pontifical Council for Legislative Texts, the Council indicated that the expression “Church *sui iuris*” could, by analogy, also include the Latin Church in the context of inter-ecclesial relations.¹³ The Explanatory Note together with these terminological changes already achieve an increased harmony between the Codes.

¹² This translation of the articles of the *motu proprio* has been prepared by Rev. Becket Soule, O.P. and Msgr. John A. Renken.

¹³ See *Comm*, 43 (2011), 315-316.

When the former *CIC* canon 111 §1 and *CCEO* canon 29 §1 were compared, they seemed not to mutually correspond for two reasons.¹⁴ First, the Latin norm did not provide for the case in which only one of the parents is Catholic. To satisfy that lacuna, art. 1 §2 has added a second paragraph to *CIC* canon 111. Regarding the second point, while Eastern canon 29 §1 foresees that a child can be ascribed to the Church *sui iuris* of his or her mother if both parents agree, some authors argued that Latin canon 111 §1 does not seem to allow for the same in the case of the Eastern Catholic mother.¹⁵ During the *iter* of *CCEO* canon 29 §1 within *PCCICOR*, a member made the same observation regarding the possible ascription of a child to the Church of his or her Eastern Catholic mother. Without providing any explanation, the *Coetus de expansione observationum* simply replied that the same possibility also exists in the *CIC* canon 111 §1.¹⁶ While *CIC* canon 111 §1 is certainly not explicit, it could be implied that the ascription to the Latin Church is only one of the options open to the parents and that ascription to the Eastern Church of the mother is also possible as it is not excluded.¹⁷

¹⁴ *CCEO* c. 29 §1 states: “A son or daughter who has not yet completed fourteen years of age is ascribed by virtue of baptism to the Church *sui iuris* to which his or her Catholic father is ascribed; or if only the mother is Catholic, or if both parents are of the same mind in requesting it, to the Church *sui iuris* of the mother....”

¹⁵ See: JOHN P. MCINTYRE, “Rite,” in *New Commentary on the Code of Canon Law*, JOHN P. BEAL et al. (eds.), New York, N.Y./Mahwah, N.J.: Paulist Press, 2000, 151. The author states: “The first paragraph of the canon (111) presents a restrictive norm. Suppose we find a Latin father and an Eastern mother. If both parents agree, can the child be baptized in the Eastern rite? The canon does not permit this. If they both agree, it must be in the Latin Church.” See also: GEORGE NEDUNGATT, “Churches *sui iuris* and Rites,” in *A Guide to the Eastern Code: A Commentary on the Code of Canons of the Eastern Churches*, GEORGE NEDUNGATT (ed.), Rome: Pontifical Oriental Institute, 2002, 119, note 43. The author states: “The corresponding *CIC* c. 111 §1 allows the parents to agree to choose the Latin Church for their children at baptism, if one of the parents does not belong to it. The Latin Church can happen to be the “ritual Church” (Church *sui iuris*) of the mother or father, but, according to the wording of the canon, they cannot agree to choose the Eastern Church *sui iuris* of the mother but only of the father.”

¹⁶ The observation, together with the expert study group’s response, stated: “If the canon is compared with *CIC* can. 111, we note that *CIC* does not open the possibility of a transfer to an Eastern rite, while the Eastern Schema allows the possibility of a transfer to the Latin rite, if the mother, for example, is Latin. Indeed, in the case of a ritual difference between the two parents, the child will always be able to be baptized in an Eastern rite given that one of the two parents belongs to it. Response: In *CIC* 111, there is the same possibility.” See *Nuntia*, 28 (1989), 20 (c. 28 §1).

¹⁷ See also DIMITRI SALACHAS, “L’appartenenza giuridica dei fedeli a una Chiesa orientale *sui iuris* o alla Chiesa latina,” *Periodica de re canonica*, 83 (1994) 27. The author states: “The *Coetus de expansione observationum* replied that ‘there is the same possibility in *CIC*,’ which is true, since *CIC* c. 111 §1 does not seem to exclude that the parents of different

The Legislator seems to be of the same mind since no changes were made to *CIC* canon 111 §1 on this score. Although specific wording allowing for a child to be ascribed to the Church *sui iuris* of an Eastern mother could have been added to the Latin norm, evidently, that was considered unnecessary to harmonize the Codes in this matter. Besides, the concordance of two Codes occurs in the context of one *Corpus Iuris Canonici* where an Eastern mother could rely on the provisions of *CCEO* canon 29 §1. Certainly, from the perspective of harmony between both the canons and the Churches, not all the answers to canonical questions affecting interecclesial issues can come from only one Code.

Art. 2. *The following text entirely takes the place of can. 112, in which a new paragraph is added and some expressions are changed:*

§1. Post receptum baptismum, alii
Ecclesiae sui iuris ascribuntur:

1° qui licentiam ab Apostolica Sede
obtinuerit;

2° coniux qui, in matrimonio ineundo
vel eo durante, ad *Ecclesiam sui iuris*
alterius coniugis se transire declaraverit;
matrimonio autem soluto, libere potest
ad latinam Ecclesiam redire;

3° filii eorum, de quibus in nn. 1 et 2,
ante decimum quartum aetatis annum
completum itemque, in matrimonio
mixto, filii partis catholicae quae ad
aliam *Ecclesiam sui iuris* legitime tran-
sierit; adepta vero hac aetate, iidem pos-
sunt ad latinam Ecclesiam redire.

§2. Mos, quamvis diuturnus, sacramenta
secundum ritum alius *Ecclesiae sui iuris*
recipiendi, non secumfert adscriptionem
eidem Ecclesiae.

§1. After the reception of baptism, the
following are enrolled in another Church
sui iuris:

1° a person who has obtained permis-
sion from the Apostolic See;

2° a spouse who, at the time of or dur-
ing marriage, has declared that he or she
is transferring to the Church *sui iuris* of
the other spouse; when the marriage has
ended, however, the person can freely
return to the Latin Church;

3° before the completion of the four-
teenth year of age, the children of those
mentioned in nn. 1 and 2 as well as, in
a mixed marriage, the children of the
Catholic party who has legitimately
transferred to another Church *sui iuris*;
on completion of their fourteenth year,
however, they can return to the Latin
Church.

§2. The practice, however prolonged, of
receiving the sacraments according to
the rite of another Church *sui iuris* does
not entail enrolment in that Church.

rites (Latin and Eastern) can mutually agree to choose that the children be baptized in the Eastern Church, to which one of the two spouses belongs.”

§3. *Omnis transitus ad aliam Ecclesiam sui iuris vim habet a momento declarationis factae coram eiusdem Ecclesiae Ordinario loci vel parrocho proprio aut sacerdote ab alterutro delegato et duobus testibus, nisi rescriptum Sedis Apostolicae aliud ferat; et in libro baptizatorum adnotetur.*

§3. *Every transfer to another Church sui iuris takes effect at the moment a declaration is made before a local ordinary of the same Church or the proper pastor or a priest delegated by either of them and two witnesses, unless the rescript of the Apostolic See provides otherwise; this is to be noted in the baptismal register.*

As in the case of art. 1 of *De Concordia inter Codices*, art. 2 replaces the former expressions “ritual Church *sui iuris*” or “ritual Church” with “Church *sui iuris*.” With particular reference to *CIC* canon 112 §1 it can be compared with *CCEO* canon 34 even though they are not in complete accord.¹⁸ Regarding parents’ transfer to another Church *sui iuris*, Eastern canon 34 considers three cases: i) both Catholic parents transfer to another Church *sui iuris*; ii) the Catholic spouse in a mixed marriage transfers to another Church *sui iuris*; and iii) one of the Catholic spouses transfers to another Church *sui iuris*. In the first two cases, the children under fourteen are ascribed to the same Church *sui iuris* to which the parents have transferred. In the third case, the children are ascribed to the other Church *sui iuris* only if both parents consent. Upon completion of the fourteenth year of age, in all three cases, the children can return to the original Church *sui iuris*. Latin canon 112 §1, 3°, however, does not seem to contemplate the third scenario. One could nevertheless argue that the same case is covered by the Latin norm, since the one parent will have obtained permission of the Holy See to transfer under §1, 1°. The fact that the *motu proprio*, which has sought to harmonize the Codes in this area, makes no adjustment here would tend to support that argument. Still, the third case does ultimately result in a difference between the Codes since the children will be ascribed to the other Church *sui iuris* without requiring the consent of both parents. As a practical example, then, consider the case of two Latin parents. One has received permission from the Holy See to transfer to the Melkite Church (*CIC* c. 112 §1, 1°). According to §1, 3° of the Latin norm, the children under fourteen would also be ascribed to the

¹⁸ *CCEO* c. 34 states: “If the parents, or the Catholic spouse in the case of a mixed marriage, transfer to another Church *sui iuris*, children who have not completed fourteen years of age, by the law itself are ascribed to the same Church; if, however, in a marriage between Catholics, only one parent transfers to another Church *sui iuris*, the children transfer only if both parents have given consent. Upon completion of the fourteenth year of age, the children can return to the original Church *sui iuris*.”

Melkite Church, apparently, without the consent of the other parent who remains ascribed to the Latin Church. According to the Eastern rule, the children would only transfer to the Melkite Church if both parents gave consent.

Until *De Concordia inter Codices*, there was no prescribed canonical procedure in the Latin Code for the transfer to another Church *sui iuris* to take effect. The Legislator outlined such a procedure in *CCEO* canon 36 for the Eastern Catholic Churches. Lacking such a procedure in individual cases, Latin ordinaries could fill that legislative gap by following Eastern canon 36 (see *CIC* c. 19). Now, by reason of art. 2 of the *motu proprio*, the Legislator has added a §3 to *CIC* canon 112 along the lines of *CCEO* canon 36. In fact, the wording is almost identical except for the reference to “local ordinary” instead of “local hierarch”. In addition, the new Latin norm requires that the transfer be noted in the baptismal register.

Regarding transfers to another Church *sui iuris*, then, Latin canon 112 §3 prescribes the formalities required for these transfers to take effect. The transfers include those made in accord with *CIC* canon 112 §1, either with the consent of the Holy See or the consent of the bishops concerned (1°),¹⁹ or in the case of a spouse who, at the time of or during marriage, has declared that he or she is transferring to the Church *sui iuris* of the other spouse (2°). Therefore, unless the Holy See’s rescript provides otherwise, those transferring to another Church *sui iuris* (Eastern Catholic Church) in these cases are obliged to make at least an oral declaration before the local ordinary, the proper pastor or another priest delegated by either of them and two witnesses. Similarly, a Latin spouse transferring to the Eastern Catholic Church *sui iuris* of the other spouse is bound by the same formalities for the transfer to take effect. Every transfer takes effect in these cases at the moment the declaration is made.

¹⁹ The Secretariat of State issued a special rescript *ex audientia Sanctissimi* dated November 26, 1992. The rescript stated: “According to canon 112 §1, 1°, of the Code of Canon Law, anyone is forbidden, after receiving baptism, from being ascribed to another ritual Church *sui iuris* unless consent for it is given by the Apostolic See. Concerning this, having accepted the opinion of the Pontifical Council for the Interpretation of Legislative Texts, the Supreme Pontiff John Paul II has established that consent of that kind can be presumed whenever the Christian faithful of the Latin Church have petitioned for the transfer to another ritual Church *sui iuris*, which has an eparchy in the same territory, provided the diocesan bishops of both dioceses consent to it in writing.” See AAS, 85 (1993), 81.

Art. 3. *The following text entirely takes the place of can. 535 §2 of the Code of Canon Law:*

§2. In libro baptizatorum adnotentur quoque *adscriptio Ecclesiae sui iuris vel ad aliam transitus, necnon confirmatio, item* quae pertinent ad statum canonicum christifidelium, ratione matrimonii, salvo quidem praescripto can. 1133, ratione adoptionis, ratione suscepti ordinis sacri, *necnon* professionis perpetuae in instituto religioso emissae; eaeque adnotationes in documento accepti baptismi semper referantur.

§2. In the baptismal register are also to be noted *enrollment in a Church sui iuris or transfer to another Church*, confirmation, and those things which pertain to the canonical status of the Christian faithful by reason of marriage, without prejudice to the prescript of canon 1133, of adoption, of reception of sacred orders, *and* of perpetual profession made in a religious institute. These notations are always to be noted on a baptismal certificate.

CCEO canon 37 requires that ascription (enrollment) in a Church *sui iuris* and transfer to another Church be recorded in the parish register even if the parish is of the Latin Church.²⁰ Among the things to be noted in the baptismal register, the former CIC canon 535 §2 made no mention of ascription in a ritual Church *sui iuris* or transfer to another Church. In achieving a concordance between the Codes on this account, the *motu proprio* has formulated a new CIC canon 535 §2, which requires that both ascriptions and transfers be recorded in the baptismal register and always noted on baptism certificates. Of course, the prior reference to “ritual Church *sui iuris*” has been replaced by “Church *sui iuris*”.

Art. 4. *The following text entirely takes the place of can. 868 §1. 2° of the Code of Canon Law:*

§1. 2° spes habeatur fundata eum in religione catholica educatum iri, *firma* §3; quae si prorsus deficiat, baptismus secundum praescripta iuris particularis differatur, monitis de ratione parentibus.

§1. 2° there must be a founded hope that the infant will be brought up in the Catholic religion, *without prejudice to §3*; if such hope is altogether lacking, the baptism is to be delayed according to the pre-scripts of particular law after the parents have been advised about the reason.

In general, there must be a founded hope that a child being presented for baptism be brought up in the Catholic religion. However, if the infant is of Orthodox parents, the same principle does not apply. That is the subject of

²⁰ CCEO c. 37 states: “Every ascription to a Church *sui iuris* or transfer to another Church *sui iuris* is to be recorded in the baptismal register of the parish where the baptism was celebrated, even if it is a parish of the Latin Church....”

the new *CIC* canon 868 §3. See the commentary on article 5 that immediately follows here.

Art. 5. *Can. 868 of the Code of Canon Law will have a third paragraph as follows:*

§3. Infans christianorum non catholicorum licite baptizatur, si parentes aut unus saltem eorum aut is, qui legitime eorundem locum tenet, id petunt et si eis corporaliter aut moraliter impossibile sit accedere ad ministrum proprium.

§3. Infants of non-Catholic Christians are licitly baptised if their parents or at least one of them or the person who legitimately takes their place request it and if it is physically or morally impossible for them to approach their own minister.

Since both Codes of the universal Church generally only concern the Catholic faithful, the norms do not oblige the faithful of our sister Orthodox Churches. Still, this new §3 does not bind the Orthodox faithful but, rather, allows for duly competent ministers to baptize children of Orthodox parents if they, or at least one of them, or the one who legitimately takes their place, request it **and** it is physically or morally impossible for them to approach their own minister.

Within *PCCICOR*, the same provision was added during the *denua recognitio* of the 1980 Schema *De Culto divino et praesertim de Sacramentis*. With regard to the elaboration of the now *CCEO* canon 681, the expert study group stated: “The proposal (made by 2 consultative bodies) to add to the canon a §5 in which it is stated that it is licit (one of them prefers ‘it is proper’) in particular situations to baptize children of Orthodox faithful has been favorably accepted....”²¹ In fact, except for minor redactional changes, no subsequent observations or manner of opposition were reported during the *iter* of this norm within *PCCICOR*. Now, if this rule seemed suitable in Eastern regions, the Legislator has found it even more appropriate and just in today’s highly mobile society where Eastern non-Catholics, for many reasons, often find themselves in predominantly Latin territories and the impossibility of having access to their proper minister.

Art. 6. *Can. 1108 of the Code of Canon Law will have a third paragraph as follows:*

§3. Solus sacerdos valide assistit matrimonio inter partes orientales vel inter partem latinam et partem orientalem sive catholicam sive non catholicam.

§3. Only a priest validly assists at a marriage between Eastern parties, or between a Latin party and an Eastern party, whether Catholic or non-Catholic.

²¹ *Nuntia*, 15 (1982), 16 (c. 16 §5).

By virtue of article 6 of the *motu proprio*, the addition of a §3 to *CIC* canon 1108 effectively resolves a doubt of law that has existed for some time. The doubt concerned whether or not a Latin deacon could validly assist at and bless a marriage between Eastern Catholics or between Latin party and an Eastern party. The question often arose in the context of Eastern Catholics who, lacking a hierarchy of their own Church *sui iuris*, were entrusted to the care of a Latin bishop. *CCEO* canon 38 stipulates: “Christian faithful of Eastern Churches, even if committed to the care of a hierarchy or pastor of another Church *sui iuris*, nevertheless remain ascribed in their own Church *sui iuris*.”²² At the same time, *CCEO* canon 828 §1 requires for validity that marriages be celebrated with a sacred rite. Then, *CCEO* canon 828 §2 establishes: “The very intervention of a priest who assists and blesses is regarded as a sacred rite for the present purpose.” However, from a predominantly Latin perspective and in view of *CIC* canon 1108 §1, which allows for deacons to assist at marriages, some canonists argued that the Latin deacon was also “ontologically and legally suitable to bless marriages” even involving Easterners.²³ Victor Pospishil singularly argued that a Latin bishop could validly delegate a Latin deacon to bless the marriage of Easterners subject to him on the basis of the principle “*locus regit actum*” (“the place rules the action”).²⁴ However, the other commentators relied heavily upon the conciliar statement made in *LG* 29, which provides: “To the extent

²² The first reference to “Church *sui iuris*” implicitly includes the Latin Church by analogy. See Pontifical Council for Legislative Texts, “Explanatory Note regarding *CCEO* canon 1,” *Comm*, 43 (2011), 315-316.

²³ The quote is from URBANO NAVARRETE, “Questioni sulla forma canonica ordinaria nei Codici latino e orientale,” *Periodica de re canonica*, 85 (1996), 506. See also: JOSEPH PRADER, *La legislazione matrimoniale latina e orientale: Problemi interecclesiali, interconfessionali e interreligiosi*, Rome: Edizioni Dehoniane, 1993, 39; Prader later changed his opinion in GEORGE NEDUNGATT (ed.), *A Guide to the Eastern Code (A Commentary on the Code of Canons of the Eastern Churches)*, Rome: Pontifical Oriental Institute, 2002, 569-570 and the second edition of his *Il matrimonio in Oriente e in Occidente*, Rome: Pontifical Oriental Institute, 2003, 249; GEORGE GALLARO, “Canon 1108 - Latin deacon assisting at marriage of two Eastern Catholics,” *RR*, (1995), 91; and VICTOR POSPISHIL, *Eastern Catholic Church Law*, 2nd ed., New York: Saint Maron publications, 1996, 574.

²⁴ POSPISHIL, *Eastern Catholic Church Law*, 2nd ed., New York: Saint Maron publications, 1996, 574. It is clear that the principle *locus regit actum* does not apply to marriage cases involving Eastern Catholics who are bound to follow their own marriage norms wherever they are in the world. The Cicognani-Staffa commentary to the 1917 Latin Code specifically referred to this exception. It stated: “However, in this matter (regarding the principle *locus regit actum*), there are exceptions: for example, wherever Easterners go, they follow proper norms in celebrating an engagement and contracting a marriage.” See H.J. CICOGNANI and DINO STAFFA, *Commentarium ad Librum Primum Codicis Iuris Canonici*, 2 vols., Rome: Pontificium Institutum Utriusque Iure, 1939, I:32.

that he has been authorized by competent authority, he (the deacon) is to ... assist at and bless marriages in the name of the Church.”²⁵ However, after Vatican II, the Pontifical Commission for the Interpretation of the Decrees of Vatican Council II responded to a *dubium* concerning a deacon’s faculties to give blessings. The Commission stated: “The deacon can impart only those blessings ... which are expressly granted to him by law.”²⁶ It is precisely Eastern canon 828 §2 that excludes the deacon by explicitly stating that the sacred rite “is the intervention of a *priest* assisting and blessing.” Accordingly, other canonists insisted that, in the context of interecclesial collaboration and relations today, *CCEO* canon 828 §2 could not be ignored in the case of marriages of Easterners entrusted to a Latin bishop.²⁷ Indeed, both *CCEO* canon 828 §2 and *CIC* canon 1108 §1 are integral parts of one body of canon law in the Catholic Church. Moreover, within *PCCICOR*, the sacred rite, as an essential element of canonical form, was continually highlighted and safeguarded as a characteristic Eastern institution.²⁸ In a *motu proprio* that seeks to harmonize in many ways the two Codes of the Catholic Church, Pope Francis nevertheless recognizes and preserves the peculiarity of the sacred rite that has traditionally distinguished the celebration of Eastern marriages. Therefore, according to *CIC* canon 1108 §3, a Latin deacon cannot validly assist at the marriage of Easterners since the intervention of a *sacerdos* (priest or bishop) who assists and blesses with a sacred rite is required for validity (see also *CCEO* c. 828).

²⁵ See NORMAN P. TANNER, (ed.), *Decrees of the Ecumenical Councils*, vol. 2, London/Washington: Sheed & Ward/Georgetown University Press, 1990, 874.

²⁶ AAS, 66 (1974), 667.

²⁷ See, for example, DIMITRIOS SALACHAS, *Il sacramento del matrimonio nel nuovo diritto canonico delle Chiese orientali*, Rome/Bologna: Edizioni Dehoniane, 1994, 200-201, footnote 43; CARL G. FÜRST, “Probleme der Form der Eheschließung von Orientalen oder mit Orientalen,” *De processibus matrimonialibus*, 2 (1995), 36-37 and JOBE ABBASS, *Two Codes in Comparison*, Rome: Pontifical Oriental Institute, 2007, 100-103.

²⁸ When, for example, six consultative bodies proposed that Eastern local hierarchs have the same faculties as Latin local ordinaries with respect to dispensation from canonical form, the expert study group replied: “*It is not accepted* because it is contrary to the Eastern conception of *ritus sacer* in the celebration of marriage, so beneficial also in the modern world in which it is necessary to highlight the sacredness of matrimonial consent, while in certain particular cases it is possible to provide here by way of special faculties granted to *bishops*.” See *Nuntia*, 15 (1982), 85-86 (c. 169 §3). Again, three members of *PCCICOR* later proposed that the faculty to dispense from canonical form should be accorded to the Eastern bishops, like the Latin bishops, in the case of mixed marriages. The special study group responded: “The faculty to dispense from the *ritus sacer* must remain reserved, in the common Code, to the Holy See in order to safeguard this institution so characteristic of the East.” See *Nuntia*, 28 (1989), 116-117 (c. 829).

The only question that might remain to be considered concerns the extraordinary form of marriage foreseen in parallel canons of both Codes (*CIC* c. 1116 §1; *CCEO* c. 832 §1). Both norms recognize the validity of a marriage celebrated in the presence of witnesses only: 1) in danger of death or 2) provided it is prudently foreseen that a priest, who is competent according to law, cannot be present or be approached without grave inconvenience and that this state of affairs will continue for a month. During the elaboration of the Eastern canon within *PCCICOR*, four consultative bodies proposed that the norm be reformulated to require for validity the presence of a priest to assist at and bless the marriage in a sacred rite. The expert study group replied: “The proposal, while to a certain degree understandable within the framework of Eastern ideas regarding the celebration of marriage, is not - nor can it be - accepted by the study group because the canon is based on the *ius naturale*....”²⁹ Still, the Church’s positive law has constantly sought to preserve Eastern traditions and, more particularly, to safeguard the sacred rite of Eastern marriages. The new *CIC* canon 1108 §3 is yet another measure taken to protect the sacred rite by not allowing Latin deacons to assist at marriages involving Easterners. In seeking to harmonize pastorally certain norms of the Latin and Eastern Codes, Pope Francis has also acknowledged that the Codes have “their own peculiarities which make them mutually independent.” Consistent with this recognition and the protection of the sacred rite of marriage in Eastern tradition, it would seem that *CCEO* canon 832 §1 should be reformulated to distinguish itself from *CIC* canon 1116 §1 by requiring the presence of a priest for validity. However, such a proposed change will have to wait since, alas, *De Concordia inter Codices* has only made modifications to the Latin Code.

Art. 7. *The following text entirely takes the place of can. 1109 of the Code of Canon Law:*

Loci Ordinarius et parochus, nisi per sententiam vel per decretum fuerint excommunicati vel interdicti vel suspensi ab officio aut tales declarati, vi officii, intra fines sui territorii, valide matrimoniiis assistant *non tantum subditorum, sed etiam, dummodo alterutra saltem pars sit adscripta Ecclesiae latinae, non subditorum.*

Unless the local ordinary and pastor have been excommunicated, interdicted, or suspended from office or declared such through a sentence or decree, by virtue of their office and within the confines of their territory they assist validly at the marriages *not only of their subjects but also, provided that at least one of them is enrolled in the Latin Church, of those who are not their subjects.*

²⁹ *Nuntia*, 15 (1982), 84 (c. 168 §1).

The former *CIC* canon 1109 stated: “Unless the local ordinary and pastor have been excommunicated, interdicted, or suspended from office or declared such through a sentence or decree, by virtue of their office and within the confines of their territory they assist validly at the marriages not only of their subjects but also of those who are not their subjects provided that one of them is of the Latin rite.”³⁰ According to this formulation, some interpreted the canon to mean that a Latin local ordinary or pastor could not assist at the marriage of Easterners, even those entrusted to their care, since they did not belong to the Latin rite. To overcome this interpretative difficulty, the Legislator has simply adopted a formulation that is nearer to the parallel *CCEO* canon 829 §1.³¹ Now, the qualifying clause “provided that at least one of them is enrolled in the Latin Church” refers only to non-subjects.

Art. 8. *The following text entirely takes the place of can. 1111 §1 of the Code of Canon Law:*

§1. Loci Ordinarius et parochus, quamdiu valide officio funguntur, possunt facultatem intra fines sui territorii matrimonii assistendi, etiam generalem, sacerdotibus et diaconis delegare, *firmitamen eo quod praescribit can. 1108 §3.*

§1. As long as they hold office validly, the local ordinary and the pastor can delegate to priests and deacons the faculty, even a general one, of assisting at marriages within the limits of their territory, *without prejudice to the prescript of can. 1108 §3.*

As a result of the new *CIC* canon 1108 §3 (see commentary to art. 6 above) and to be consistent with it, the Legislator has qualified *CIC* canon 1111 §1 with specific regard to the possibility of delegating a deacon to assist at marriages in the Latin Church. A deacon cannot be delegated to assist at a marriage involving Easterners, whether Catholic or non-Catholic, since only a *sacerdos* (bishop or priest) validly celebrates these marriages.

³⁰ The Latin text of *CIC* c. 1109 read: “*Loci ordinarius et parochus, nisi per sententiam vel per decretum fuerint excommunicati vel interdicti vel suspensi ab officio aut tales declarati, vi officii, intra fines territorii, valide matrimonii assistunt non tantum subditorum, sed etiam non subditorum, dummodo eorum alteruter sit ritus latini.*”

³¹ *CCEO* c. 829 §1 states: From the day of taking canonical possession of office and as long as they legitimately hold office, everywhere within the boundaries of their territory, local hierarchs and local pastors validly bless the marriage of spouses, whether they are subjects or, provided that at least one of the parties is ascribed to his Church *sui iuris*, they are non-subjects.” (This is the writer’s translation.)

Art. 9. *The following text entirely takes the place of can. 1112 §1 of the Code of Canon Law:*

§1. Ubi desunt sacerdotes et diaconi, potest Episcopus dioecesanus, praevis voto favorabili Episcoporum conferentiae et obtenta licentia Sanctae Sedis, delegare laicos, qui matrimoniis assistant, *firmiter praescripto can. 1108 § 3.*

§1. Where there is a lack of priests and deacons, the diocesan bishop can delegate lay persons to assist at marriages, with the previous favourable vote of the conference of bishops and after he has obtained the permission of the Holy See, *without prejudice to the prescript of can. 1108 §3.*

As in the case of *CIC* canon 1111 §1 (see commentary to art. 8 above), *CIC* canon 1112 §1 had to be modified following the Legislator's addition of *CIC* canon 1108 §3 to the Latin Code. In accord with the new norm, only a bishop or priest (*sacerdos*) can validly assist at and bless marriages between Eastern parties or between a Latin party and an Eastern party, whether Catholic or non-Catholic. Therefore, the possibility of delegating a lay person to assist at these marriages is also excluded.

Art. 10. *Can. 1116 of the Code of Canon Law will have a third paragraph as follows:*

§3. *In iisdem rerum adiunctis, de quibus in §1, nn. 1 et 2, Ordinarius loci cuilibet sacerdoti catholico facultatem conferre potest matrimonium benedicendi christifidelium Ecclesiarum orientalium quae plenam cum Ecclesia catholica communionem non habeant si sponte id petant, et dummodo nihil validae vel licitae celebrationi matrimonii obstat. Idem sacerdos, semper necessaria cum prudentia, auctoritatem competentem Ecclesiae non catholicae, cuius interest, de re certiorum faciat.*

§3. *In the circumstances mentioned in §1, nn. 1 and 2, the local ordinary can confer on any Catholic priest the faculty of blessing the marriage of the Christian faithful of Eastern Churches which do not have full communion with the Catholic Church, if they spontaneously seek it, and provided that nothing prevents the valid and licit celebration of the marriage. This priest, always with the necessary prudence, is to inform the competent authority of the non-Catholic Church concerned.*

With respect to the faculty that can be granted to any Catholic priest to bless the marriage of faithful of an Eastern non-Catholic (Orthodox) Church, the Eastern Code has unique provisions. *CCEO* canon 833 states:

§1. The local hierarch can grant to any Catholic priest the faculty of blessing the marriage of the Christian faithful of an Eastern non-Catholic Church if those faithful cannot approach a priest of their own Church without great difficulty and if they voluntarily ask for the blessing as long as nothing stands in the way of a valid and licit celebration.

§2. If possible, before blessing the marriage, the Catholic priest is to notify the competent authority of those Christian faithful about the matter.

Within *PCCICOR*, this canon was added to the draft of the Eastern Code only after the 1986 *Schema Codicis Iuris Canonici Orientalis* was sent to members for their observations. The *Coetus de expansione observationum*, entrusted with the review of those observations, noted that a proposal was made to insert this canon for pastoral exigencies. The experts accepted the proposal and their exact wording of the canon was subsequently promulgated.³²

While the 1983 Latin Code did not contain such a canon, the pastoral need for one gradually became evident in the same way as it did for a norm providing for the baptism of children of non-Catholic Christians (see commentary above on art. 5 and the new *CIC* c. 868 §3). Given today's highly mobile society, Christian faithful of an Eastern non-Catholic Church may just as often find themselves in predominantly Latin territories and the impossibility of having a priest of their own Church bless their marriage. Article 10 of the *motu proprio* addresses this pastoral lacuna by adding a §3 to *CIC* canon 1116. A local ordinary can confer on any Catholic priest the faculty of blessing the marriage of Eastern non-Catholics if they spontaneously seek it and provided that nothing prevents the valid and licit celebration of the marriage. However, unlike *CCEO* canon 833, the application of *CIC* canon 1116 §3 is tied to the two limiting circumstances mentioned in its §1: 1) the danger of death or 2) provided it is prudently foreseen that a priest, who is competent according to law, cannot be present or be approached without grave inconvenience and that this state of affairs will continue for a month. Also, unlike *CCEO* canon 833 §2, the new Latin norm does not require the priest, if it is possible, to notify the competent authority of those Christian faithful before he blesses the marriage. However, if the Latin priest were to notify the competent authority beforehand, which *CIC* canon 1116 §3 does not exclude, it could well happen that the competent authority might supply the lack of a proper minister quickly or, at least, within a month. Hence, while *CIC* canon 1116 §3 achieves a certain harmony with *CCEO* canon 833, it does not appear to be the same in every respect.

³² See *Nuntia*, 28 (1989), 115 (c. 827 bis).

Art. 11. *The following text entirely takes the place of can. 1127 §1 of the Code of Canon Law:*

§1. Ad formam quod attinet in matrimonio mixto adhibendam, servantur praescripta can. 1108; si tamen pars catholica matrimonium contrahit cum parte non catholica ritus orientalis, forma canonica celebrationis servanda est ad liceitatem tantum; ad validitatem autem requiritur interventus sacerdotis, servatis aliis de iure servandis.

§1. The prescripts of can. 1108 are to be observed for the form to be used in a mixed marriage. Nevertheless, if a Catholic party contracts marriage with a non-Catholic party of an Eastern rite, the canonical form of the celebration must be observed for liceity only; for validity, however, the presence of a *priest* is required and the other requirements of the law are to be observed.

In referring to a mixed marriage in which the non-Catholic party belonged to an Eastern rite, the former *CIC* canon 1127 §1 required, for validity, the presence of a sacred minister. In keeping with the new *CIC* canon 1108 §3 and the rule that only a priest validly assists at a marriage involving Easterners, *De Concordia inter Codices* now calls for the presence of a priest. By “presence,” the *motu proprio* implicitly intends a priest’s intervention by assisting at and blessing the marriage (see *CIC* cc. 1108 §3 and 1116 §3). As in the revised formulations of *CIC* canons 111-112 and 535 §2, the reference to “rite” in Latin canon 1127 §1 might have yielded to “Church” since it is the sister Orthodox Churches who are intended here.

The Promulgation and Entry into Force

In concluding his *motu proprio*, Pope Francis orders that it “be promulgated by publication in the daily *L’Osservatore Romano* and then published in the official commentary *Acta Apostolicae Sedis*.” Now, regarding promulgation and entry into force of the laws of the Latin Church, *CIC* canon 8 §1 states: “Universal ecclesiastical laws are promulgated by publication in the official commentary, *Acta Apostolicae Sedis*, unless another manner of promulgation has been prescribed in particular cases. They take force only after three months have elapsed from the date of that issue of the *Acta* unless they bind immediately from the very nature of the matter, or the law itself has specifically and expressly established a shorter or longer suspensive period (*vacatio*).” At first glance, one might conclude that *De Concordia inter Codices* would enter into force on December 15, 2016, three months after its publication on September 15, 2016 in the Italian daily, *L’Osservatore Romano*. However, it does not seem entirely clear that the *motu proprio*’s

promulgation by publication in *L'Osservatore Romano* expressly replaces the usual manner of promulgation by publication in the official *Acta Apostolicae Sedis*. One could argue that the Legislator does not intend the promulgation by publication in the *Acta* to be substituted, but merely subsequent. Besides, the Italian daily, *L'Osservatore Romano*, is not the universal Church's official commentary nor is it at all evident that the *motu proprio* should bind immediately *ex natura rei*. Moreover, the pope does not set a shorter or longer suspensive period (*vacatio*) than the usual three months, to which *CIC* canon 8 §1 refers, from the time that the *motu proprio* is published in the *Acta* and no other publication is referenced there. On this basis, it would seem that *De Concordia inter Codices* will only enter into force three months from the date that it is published in *Acta Apostolicae Sedis*.

APPENDIX**APOSTOLIC LETTER
GIVEN MOTU PROPRIO
OF THE SUPREME PONTIFF
FRANCIS*****De concordia inter Codices*****BY WHICH SOME NORMS OF THE CODE OF CANON
LAW ARE CHANGED****[THE PREAMBLE]**

Because of Our constant solicitude for a concordance between the Codes, We came to observe some points of difference between the norms of the Code of Canon Law and the Code of Canons of the Eastern Churches.

On one hand, the Codes have common norms and, on the other hand, their own peculiarities which make them mutually independent. However, it is necessary that, even in these specific norms, there be an appropriate degree of harmony. Indeed, these discrepancies, if and to the extent they are present, have a negative effect on pastoral practice, especially in cases in which relations between subjects belonging respectively to the Latin Church and an Eastern Church are governed.

This happens particularly these days, to be sure, when the migration of peoples results in many Eastern Christian faithful living in Latin territories. This new situation creates multiple pastoral and juridical questions which need to be resolved with appropriate norms. It needs to be remembered that Eastern faithful are bound to observe their own rite wherever they are (cfr. CCEO can. 40 §3; Vat. II Ecum. Conc. Decr. *Orientalium Ecclesiarum*, 6) and, as a result, the competent ecclesiastical authority is to see to it most earnestly that appropriate means are provided them to be able to fulfill this obligation (cfr. CCEO can. 193 §1; CIC can. 383 §§1-2; Postsyn. Ap. Exhort. *Pastores gregis*, 72). Harmonizing the norms is certainly one of the means that will help to foster the growth of the venerable Eastern rites (cfr. CCEO can. 39), allowing the Churches *sui iuris* to exercise pastoral care in a more effective way.

However, it is necessary to keep in mind the need to recognize the disciplinary peculiarities of the regional context in which these inter-ecclesial relations

take place. In the West, which for the greater part is Latin, we must find a just equilibrium between safeguarding the proper law of the Eastern minority and respect for the historical canonical tradition of the Latin majority, so as to avoid any undue clashes and conflicts and to promote fruitful collaboration among all the Catholic communities present in a given territory.

Another reason for integrating the norms of CIC with explicit dispositions parallel to those found in CCEO is the need of better defining relations with the faithful belonging to non-Catholic Eastern Churches, who are now present in increasing numbers in Latin territories.

It is also to be noted that canonists' commentaries have pointed to discrepancies to be found between both Codes and almost unanimously indicate the particular issues and how to render them harmonious.

Therefore, the purpose of the norms introduced by this *Motu Proprio* is that of arriving at a concordant discipline that offers certainty in the exercise of pastoral care in individual cases.

The Pontifical Council for legislative Texts, by way of a Commission of experts in Eastern and Latin canon law, has identified the issues mainly in need of legislative adjustment, by elaborating a text sent to approximately thirty Consultors and experts around the world, as well as to the authorities of Latin Ordinariates for Easterners. After having considered the observations received, the Plenary Session of the Pontifical Council for Legislative Texts has approved a new text.

All this considered, We now dispose the following: (The articles of the *motu proprio* follow.)

NOTES SUR LA DÉROGATION DU C. 579 RESCRIT *EX AUDIENTIA* (11 MAI 2016)

GISÈLE ACOTCHOU*

RÉSUMÉ — Le Canon 579 stipule que les évêques diocésains peuvent ériger des instituts de vie consacrée par un décret formel, pourvu que le Siège Apostolique soit consulté. À partir du 1er juin 2016, cette consultation est nécessaire pour la validité du décret d'érection. Cette dérogation provenant du canon 579 a été faite en audience, par le Pape François et le secrétaire d'État, et promulgué dans un rescrit *ex audientia Sanctissimi* le 11 mai 2016 (versions française et anglaise dans l'annexe ci-dessous). Après avoir noté la raison de la dérogation, l'A. offre des informations pertinentes pour les étapes, les critères et les documents requis pour l'érection d'un institut de vie consacrée de droit diocésain.

SUMMARY — Canon 579 says that diocesan bishops can erect institutes of consecrated life by a formal decree, provided that the Apostolic See has been consulted. As of 1 June 2016, this consultation is required for the *validity* of the decree of erection. This derogation from c. 579 was made by Pope Francis in an audience with the Secretary of State and promulgated in a rescript *ex audientia Sanctissimi* on 11 May 2016 (French and English versions in the Appendix below). After noting the reason for the derogation, the A. offers information pertinent to the stages, criteria, and required documents for the erection of an institute of consecrated life of diocesan right.

Introduction

L'Église porte une attention toute particulière aux instituts de vie consacrée, notamment en ce qui regarde leur érection canonique. En effet, l'érection d'un institut de droit diocésain revient selon le droit à l'évêque diocésain, conformément au canon 579 qui stipule : « Les évêques diocésains,

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chacun sur son territoire, peuvent ériger des instituts de vie consacrée par décret formel, pourvu que le Siège Apostolique ait été consulté ». Cela signifie qu'un évêque ne doit pas outrepasser cette norme, pour l'érection d'un institut diocésain.

Or, dans la pratique, le Saint-Siège a constaté que cette loi n'est pas toujours respectée par tous. Fort de ce motif, le Pape François vient de sortir un rescrit¹ pour renforcer le canon 579 et donner un plein pouvoir de contrôle au Siège Apostolique.

Dès lors, comment doit se faire cette consultation préalable ? Sur quoi va se baser le Saint-Siège pour procéder au « discernement suffisant » ? De quels documents a-t-il besoin pour le guider dans ce discernement ? Le présent article veut apporter une réponse à ces questions, en essayant de donner les directives à suivre. Il le fera en trois parties : I – les étapes ; II – les critères ; III – les documents du dossier de la demande.

1 — *Les étapes*

La législation actuelle au canon 573, § 2 prescrit en effet que les instituts de vie consacrée soient érigés canoniquement par l'autorité compétente de l'Église. En reprenant ce canon, Lourdy Dorismond explique que « le Code établit bien clairement les principes concernant l'existence ou la création d'un institut et aucun groupe de fidèles ne peut prétendre de son propre mouvement constituer un institut de vie consacrée dans l'Église sans qu'il soit légitimement érigé par l'autorité ecclésiastique compétente »². Dans cette même ligne, le canon 579 précise distinctement que l'autorité compétente de l'Église dont il est question au canon 573, § 2 sera nécessairement l'évêque diocésain et en décrit fort bien la manière de procéder. Ne parlant pas d'un ordinaire du lieu, les vicaires généraux et évêques de même que

¹ Concrètement, ce rescrit est un acte législatif du Pape donné par voie orale lors d'une audience. Etant une loi universelle, tous ceux pour qui il est porté sont tenus par lui (voir c. 12, § 1). Ici, il est destiné aux instituts de vie consacrée de droit diocésain.

Ledit rescrit, dont le texte original italien se trouve dans l'*Osservatore romano* du 11 mai 2016, et la version française dans l'ORLF n° 21 du 26 mai 2016, est déjà entré en vigueur le 1^{er} juin 2016. Il est mis en annexe de cet article tel qu'il figure sur le Site : <http://www.la-croix.com/Urbi-et-Orbi/Documentation-catholique/Saint-Siege/Rescrit-ex-audientia-en-vue-de-l-erection-des-instituts-diocesains-de-vie-consacree-2016-06-02-1200765473>.

² L. DORISMOND, *Le directoire pour la gestion des biens temporels dans les instituts religieux* (c. 635, § 2) avec une application particulière aux Missionnaires Oblats de Marie, Thèse de doctorat, Ottawa, Université Saint-Paul, 2009.

les administrateurs diocésains sont exclus, à moins qu'ils aient un mandat spécial³. C'est donc l'évêque diocésain, autorité compétente dans son propre territoire, qui peut suivre plus facilement les débuts d'un institut⁴. En fait, il s'agit d'un décret administratif particulier (voir c. 48) de l'érection canonique d'une association publique de fidèles en institut de droit diocésain. Par cet acte, l'évêque diocésain ne fonde pas l'institut, mais il accueille le don déjà reçu par le fondateur et l'approuve. Approuver, écrit Joseph Khoury, c'est reconnaître, déclarer authentique, protéger, favoriser, propager conformément à la motion propre de l'Esprit et à son impulsion, veiller à ce que son action reconnue dans le fondateur puisse subsister⁵.

Il convient de préciser que le même canon 579 impose à l'évêque diocésain une consultation préalable du Saint-Siège⁶. Cela signifie notamment que l'évêque diocésain ne peut constituer à l'essai la nouvelle fondation, puis informer après le Saint-Siège. La consultation ici est exigée pour la validité de l'acte de l'évêque diocésain, conformément au récent rescrit du Pape François qui souligne que « cette consultation préalable du Saint-Siège doit être comprise comme nécessaire » (*ad validitatem*) (*pour la validité*) de l'érection d'un institut diocésain de la vie consacrée, sous peine de nullité du décret d'érection dudit institut ». On ne parle pas de l'approbation du Saint-Siège pour que cet acte soit valide, mais d'une consultation auprès du Saint-Siège, c'est-à-dire d'un *nihil obstat* (rien ne fait obstacle ou ne s'oppose à l'érection).

Si aujourd'hui, la raison d'être de cette prescription concernant la consultation préalable du Saint-Siège est pour faire le « discernement suffisant », dans le passé c'était un autre motif expliqué par Adrien Cance. Celui-ci affirme

³ CIC/17, c. 492, § 1 l'avait bien spécifié : « Les évêques, mais non le vicaire capitulaire ou le vicaire général, peuvent fonder des congrégations religieuses (dans leur diocèse) ; mais ils ne peuvent ni les fonder ni permettre leur fondation sans avoir, au préalable pris l'avis du Siège apostolique [...] ». De même, CIC/83, c. 134, § 3 prescrit : « Ce que les canons attribuent nommément à l'évêque diocésain dans le domaine du pouvoir exécutif est considéré comme appartenant uniquement à l'évêque diocésain et à ceux qui, selon le c. 381 § 2, ont un statut équiparé au sien, à l'exclusion du vicaire général et du vicaire épiscopal, à moins qu'ils n'aient le mandat spécial ».

⁴ Voir CIC/83, c. 312, § 1, 3°. C'est à l'évêque diocésain qu'il appartient de juger de l'authenticité et de la mise en œuvre de ce don ; c'est aussi à lui qu'il appartient spécialement de ne pas éteindre l'Esprit, mais de tout examiner et de retenir ce qui est bon (voir 1 Th 5,19-21).

⁵ Voir J. KHOURY, *Nouveau droit canonique : vie consacrée (essai de commentaire des canons 573-709)*, Rome, s.n., 1984.

⁶ Dans le contexte-ci, le Saint-Siège est représenté précisément par la Congrégation pour les instituts de vie consacrée et les sociétés de vie apostolique. Si c'est une association publique de fidèles qui veut devenir exclusivement un institut missionnaire, c'est la Congrégation pour l'évangélisation des peuples (voir V.G. D'SOUZA, « Erection of a Religious Institute of Diocesan Right : Law and Praxis », dans *Studies in Church Law*, 1 [2005]).

que les congrégations religieuses n'ayant cessé de se multiplier, Pie X défendit, dans son Motu proprio *Dei providentis* du 16 juillet 1906, la création de nouveaux instituts à l'insu du Saint-Siège⁷. En outre, le Code de 1917 a maintenu cette défense, en la modifiant légèrement au canon 492, § 1. C'est ainsi que le droit d'ériger de nouvelles congrégations religieuses dans un diocèse est accordé aux évêques de ce diocèse, mais non aux vicaires capitulaires ou aux vicaires généraux ; cependant les évêques ne feront ou ne permettront ces fondations nouvelles qu'après avoir consulté le Siège Apostolique.

En réalité, l'érection d'un groupe en institut de droit diocésain est généralement précédée par des contacts directs, assez longs, du groupe des personnes qui veulent former cet institut avec l'évêque responsable, car la connaissance des personnes est nécessaire. Une première approbation peut se donner de vive voix à ce groupe qui se réunit d'une manière informelle. Peu à peu, cette « association informelle », si l'on peut l'appeler ainsi, pourra se constituer en association privée, avec les normes qui la régissent⁸. Vu sa croissance, il peut obtenir ensuite le statut d'association publique, érigée canoniquement par l'évêque diocésain ; dès lors, il peut aussi acquérir le caractère de personne juridique et jouir *ipso facto*, de certains droits et privilèges selon la loi⁹. Cette érection ou cette reconnaissance canonique se fait donc d'abord au niveau diocésain. En effet, toute fondation passe d'abord par la période *ad experimentum* pendant laquelle, une fois ses statuts approuvés par l'évêque diocésain, elle est reconnue comme une association publique de fidèles¹⁰. Et pour en arriver à cette étape, il est exigé tout d'abord le consentement écrit de l'évêque diocésain¹¹. Dans ce contexte, une association

⁷ Voir PIE X, Motu proprio *Dei providentis*, 16 juillet 1906, dans ASS, 39 (1906), traduction française par P. BASTIEN, *Directoire canonique*, Bruges, Ch. Beyaert, 1933, p. 540 : « Nul évêque ou nul ordinaire de quelque lieu que ce soit ne fondera ou ne permettra que soit fondée dans son diocèse une nouvelle congrégation de religieux de l'un ou de l'autre sexe, sans en avoir reçu par lettre l'autorisation du Siège Apostolique » ; A. CANCE, *Le code de droit canonique : commentaire succinct et pratique*, t. 2, Paris, J. Gabalda et C^{ie}, 1934.

⁸ Voir CIC/83, cc. 298-329.

⁹ Par exemple la perpétuité dont il est question au CIC/83, c. 120, § 1 : « La personne juridique est par sa nature perpétuelle ; cependant elle s'éteint si elle est supprimée légitimement par l'autorité compétente, ou si, pendant une durée de cent ans, elle cesse d'agir [...] ». En somme, il faut faire référence aux canons pertinents des normes générales du Livre I du Code (CIC/83, cc. 1-203), et respecter spécialement ici les normes sur les personnes juridiques : les élections, la suppression, les fusions, les biens temporels (CIC/83, cc. 113-123).

¹⁰ Voir V. DE PAOLIS, « Associations Founded with the Intent of Becoming Religious Institutes », dans *Consecrated Life*, 21/2 (1999).

¹¹ CIC/83, c. 312, § 2 : « Pour ériger valablement dans un diocèse une association ou une section d'association, même en vertu d'un privilège apostolique, le consentement écrit de l'évêque diocésain est requis [...] ».

publique diocésaine de fidèles est érigée par l'évêque diocésain, en vue de devenir un institut de vie consacrée (religieux ou séculier) de droit diocésain¹². C'est ce qu'explique Jean Beyer en disant qu'un évêque diocésain ne fera pas trop rapidement l'érection d'un groupe en institut de droit diocésain, sans l'avoir d'abord érigé en association publique et l'avoir vu vivre comme association privée, tout en reconnaissant ses premiers statuts¹³.

En résumé, une association publique ne représente normalement que les tous premiers pas du développement de la vie religieuse pour devenir un institut religieux de droit diocésain. Ce n'est qu'après que celui-ci aura le droit de solliciter du Saint-Siège d'être reconnu comme un institut de droit pontifical¹⁴. Ce qui signifie pour lui une indépendance plus grande de la juridiction diocésaine.

Après ces étapes à franchir, que dire des critères à observer ?

2 — *Les critères*

Certes, il est bon que l'érection en institut de droit diocésain ne soit pas précipitée ; il faut nécessairement beaucoup de prudence, pendant un certain nombre indéfini d'années, afin de prendre le temps nécessaire, approprié pour mieux discerner le fruit de cette inspiration qu'est la fondation d'un institut. Il est donc évident que l'évêque diocésain ne peut jamais ériger en institut de droit diocésain une association publique qui est encore dans « la période de son enfance »¹⁵. Cependant, il faudrait éviter aussi la lenteur, ne pas faire trop traîner les érections. De ce fait, il serait opportun de fixer certains critères, au moins dans le droit particulier des diocèses. Il ne peut s'agir de déterminer les délais (tels que le délai pour l'approbation d'une association publique de fidèles, le délai pour la réforme des constitutions, le délai pour la reconnaissance canonique d'un institut religieux de droit diocésain), parce que les rythmes ne sont pas les mêmes ; on ne peut pas enfermer l'évolution d'un institut dans une durée.

¹² Voir CIC/83, cc. 301 et 312-320. Par ailleurs, il faut noter qu'en application à AA, n° 19, le CIC/83, c. 215 reconnaît aux fidèles le droit fondamental et la liberté d'association dans l'Église catholique : « Les fidèles ont la liberté de fonder et de diriger librement des associations ayant pour but la charité ou la piété, ou encore destinées à promouvoir la vocation chrétienne dans le monde, ainsi que de se réunir afin de poursuivre ensemble ces mêmes fins ».

¹³ Voir J. BEYER, *Le droit de la vie consacrée : normes communes*, Paris, Ed. Tardy, 1988.

¹⁴ Voir C.R. ORTH, *The Approbation of Religious Institutes*, Washington, D.C., Catholic University of America, 1931.

¹⁵ C.R. ORTH, *The Approbation of the Religious Institutes*.

On sait que dans les us et coutumes ou selon la pratique de la Congrégation pour les instituts de vie consacrée et les sociétés de vie apostolique, en plus de ceux énumérés au sujet des personnes juridiques (voir CIC/83, cc. 113-123 ; 634), il faut tenir compte des critères suivants que l'évêque diocésain doit être en mesure d'évaluer dans sa lettre de demande auprès du Saint-Siège.

Il s'agit de produire les informations nécessaires sur :

- la finalité (œuvres de piété, d'apostolat, de charité spirituelle ou temporelle qui doit s'accorder avec la mission de l'Église et dépasser les intérêts des membres [CIC/83, c. 114, §§ 1-2]) ;
- la mission remplie au nom de l'Église et pour le bien public (CIC/83, c. 116, § 1) ;
- les moyens suffisants pour atteindre cette finalité (CIC/83, c. 114, § 3) ;
- la spiritualité, le progrès affirmant la vitalité par la diffusion des œuvres.

D'autres renseignements sont aussi indispensables à donner sur l'association publique, tels que :

- l'intégration dans l'Église particulière ;
- l'utilité pour le diocèse ;
- le degré de la prospérité, de la solidité des maisons et leur propagation dans plusieurs diocèses (CIC/17, c. 492, § 2)¹⁶ ;
- la qualité de vie évangélique des membres de l'association publique ;
- l'autonomie financière pour acquérir, posséder, administrer et aliéner des biens temporels (CIC/83, c. 634, §1) ;
- la preuve de maturité, de croissance, de stabilité et de valeur dans l'Église tout entière.

Enfin, lorsque qu'elle augmentera suffisamment en effectifs avec un minimum de cinquante [50] membres profès¹⁷ — dont la majeure partie serait de vœux perpétuels —, l'évêque diocésain du siège principal peut ériger cette

¹⁶ Le canon 579 du CIC/83 qui correspond au canon 492, § 2 du CIC/17 ne mentionne pas comme critère des maisons à ouvrir dans plusieurs diocèses.

¹⁷ Il n'y a pas de document « officiel » au sujet du nombre de 50 requis pour devenir un institut de droit diocésain, de même que des 100 membres pour acquérir le statut de droit pontifical, mais c'est la pratique constante du Saint-Siège.

Selon Victor George D'Souza, il est requis au moins 40 membres profès pour ériger une association publique comme un institut de droit diocésain (voir V.G. D'SOUZA, « Erection of a Religious Institute of Diocesan Right : Law and Praxis »).

association publique comme un institut religieux de droit diocésain, à condition que le Saint-Siège soit consulté conformément au canon 579 et à la décision actuelle du Pape François.

Venons-en maintenant aux documents nécessaires à fournir par chaque institut pour solliciter son érection canonique.

3 — *Les documents du dossier de la demande*

Il faut encore rappeler que, selon le canon 579 du CIC/83, l'évêque diocésain doit consulter au préalable le Saint-Siège pour ériger valablement une association publique de fidèles en institut religieux de droit diocésain. C'est au Saint-Siège donc que l'évêque diocésain enverra les documents nécessaires, avant de rédiger le décret d'érection.

Les documents pour obtenir le *nihil obstat* de la Congrégation pour les instituts de vie consacrée et les sociétés de vie apostolique, sont prescrits par les directives du Motu proprio *Dei providentis*, toujours valables aujourd'hui¹⁸. Ces documents sont les suivants :

1. Le *curriculum vitae* du fondateur. Ce cursus de la vie de fondateur doit faire ressortir sa personnalité, notamment la vie de foi qu'il a menée et son attachement à l'Église.
2. Le *curriculum vitae* du premier supérieur général (s'il s'agit d'une autre personne qui n'est pas le fondateur). Ce document retracera sa vie chrétienne et spirituelle, ses connaissances ou capacités et ses actions en faveur de son association.
3. L'histoire et le statut juridique de l'association publique¹⁹. Il s'agit de raconter comment l'association est née dès le départ, comment a-t-elle évolué et à quelle étape est-elle arrivée.

¹⁸ Voir P. BASTIEN, *Directoire canonique*, pp. 540-541 ; V.G. D'SOUZA, « Erection of a Religious Institute of Diocesan Right : Law and Praxis ».

¹⁹ À propos de l'histoire de l'association, Victor George D'Souza donne des précisions très importantes : « L'histoire de l'association devrait inclure les points suivants : nom et prénom du fondateur ; objet, date et lieu de fondation ; nom de l'évêque qui a autorisé sa création dans son diocèse ; noms des premiers membres ; érection, date et lieu de la première maison du noviciat, nom de l'évêque qui l'a érigée ; nombre des premiers novices et date de leur admission au noviciat ; de même pour les premiers membres de vœux privés temporaires et perpétuels ; nom du premier maître des novices ; dates de la tenue des chapitres généraux ; celui qui a approuvé les premières constitutions et quand ; activités apostoliques de l'association au début et à l'heure actuelle ; développement de l'association dans d'autres diocèses ; spiritualité particulière de l'association. Dans le cas d'une association

4. Les photographies de l'habit religieux des novices ainsi que des membres profès. Ces photographies qui seront prises de face et de dos, doivent montrer clairement le modèle de ces deux habits. On fera très attention pour ne pas copier textuellement le modèle d'un autre institut. Il faut au contraire faire preuve d'ingéniosité, en réalisant quelque chose d'original. À noter que cette exigence aujourd'hui n'a pas la même importance qu'autrefois, du moins dans certains pays.
5. Six copies des constitutions. Les constitutions ou le Code fondamental — exprimant et protégeant avant tout la vocation et l'identité de chaque institut, en vue d'une grande fidélité —, on veillera à ne pas séparer les éléments spirituels et le juridiques qui font partie d'un seul charisme et, de plus, à ne pas multiplier les normes sans nécessité comme le prescrit le canon 587 et l'avait affirmé le Pape Paul VI (voir Motu proprio *Ecclesiae sanctae* II, n° 13). Somme toute, les constitutions doivent être pour l'institut et ses membres une « règle de vie » au sens le plus profond du terme. Elles doivent être composées et rédigées de telle façon que les religieux puissent y attacher leur cœur, y revenir souvent dans la lecture et la prière, personnelle et communautaire ; leur langage doit être clair et limpide, facile à inscrire dans la mémoire. Les constitutions ne seront une « règle de vie » que dans la mesure où elles traceront une route suffisamment dessinée pour qu'on puisse l'emprunter facilement et aisément. Elles doivent contenir un authentique « programme de vie religieuse ». Au candidat frappant à la porte de l'institut et demandant : « Qui êtes-vous, que vivez-vous ? », on doit pouvoir tendre les constitutions et dire : « Lisez, la réponse est là ! »²⁰.
6. Six copies des statuts actuels de l'association. Les statuts sont le premier document établi dès la création de l'association pour réglementer celle-ci. Ils indiquent sa dénomination, son siège, sa durée, son but ou son objectif, ses moyens d'action, les conditions d'adhésion des membres, sa composition (le fonctionnement et les attributions de ses organes), ses ressources, sa dissolution et d'autres dispositions pratiques (par exemple la modification et l'entrée en vigueur des statuts).
7. Deux exemplaires des livres de prières, si l'association a un tel manuel. Les religieux ne peuvent pas se passer de ces livres, vu l'importance de la prière dans leur vie. En effet, ils se rappelleront tout

“cléricale” : lieu où les membres étudient les ordres sacrés ; d'autres événements importants au cours de l'histoire de l'association » (V.G. D'SOUZA, « Erection of a Religious Institute of Diocesan Right : Law and Praxis »).

²⁰ COMITÉ CANONIQUE DES RELIGIEUX, *Directoire canonique. Vie consacrée et Sociétés de vie apostolique*, Paris, Les éditions du Cerf, 1986.

d'abord de la recommandation du Seigneur Jésus : « Priez sans cesse » (Lc 21,36). La prière par laquelle ils contemplent les réalités divines et sont unis constamment à Dieu, constitue leur premier et leur principal office (voir c. 663, § 1). Et Aussi, pour Saint Jean-Paul II, la prière « exprime la vocation à la louange et à l'intercession qui est propre aux personnes consacrées » (*Vita consecrata*, n° 95).

8. Deux exemplaires du cérémonial, s'il existe. C'est-à-dire des livres de cérémonies et des différents actes liturgiques, comme par exemple le rituel de la profession, celui de la célébration des fêtes ou des solennités propres à l'association.
9. Les statistiques concernant le nombre de maisons, le nombre de membres, que ce soit les profès perpétuels ou temporaires (habituellement, comme noté ci-dessus, le Saint-Siège exige une cinquantaine de membres avant de considérer une demande), le nombre de novices, les qualifications éducatives des membres.
10. La déclaration de la situation économique. C'est-à-dire l'état financier à présenter à travers les rapports comptables. De la sorte, on pourra évaluer si cette association publique est en mesure de se prendre financièrement en charge ; si elle peut subvenir à tous ses besoins ; bref, si elle est autonome sur le plan financier.
11. La déclaration relative aux événements extraordinaires (visions).
12. La déclaration des exercices spécifiques de piété, s'il y en a.
13. La déclaration au sujet des instituts similaires existant déjà dans le diocèse.
14. Les lettres testimoniales des évêques des diocèses où l'association est déjà présente, décrivant le rapport exact sur l'état de l'association. Cette prescription vient du canon 595, § 1. Par-là, il faut comprendre que l'érection d'un institut fait partie des « affaires majeures regardant l'ensemble de l'institut et dépassant le pouvoir de l'autorité interne », c'est pourquoi les autres évêques sont appelés à donner leur avis par écrit. Ceci étant, toute association publique a intérêt à garder de bonnes relations avec tous les évêques, vu que ceux-ci doivent se prononcer un jour ou l'autre sur son sort.
15. La demande du décret d'érection par le supérieur général.
16. Le vote du chapitre. Entendre ici, le chapitre général ou l'assemblée générale des membres. On veut savoir, si le désir ou la décision de devenir un institut vient de la majorité des membres de l'association ou seulement de quelques-uns. Les associations ne sont pas tenues de tenir un chapitre général, mais nous pouvons procéder par analogie,

car c'est « le chapitre général qui détient l'autorité suprême » (c. 631, § 1), c'est-à-dire qu'il est souverain ; alors une telle décision doit émaner nécessairement du chapitre général ou de l'assemblée générale.

17. La demande formelle, c'est-à-dire écrite, de l'évêque de la maison mère. La maison mère de l'association, qui peut être différente de la maison généralice (celle où réside le supérieur général), correspond au « siège principal » (cc. 595, § 1 ; 625, § 2).

Conclusion

Somme toute, on n'ignore désormais que, ne pas consulter préalablement le Saint-Siège sur l'érection d'un institut entachera de nullité un tel décret d'érection. Par conséquent, cette érection sera annulée. Il s'agit, non pas d'un « centralisme romain »²¹ comme pourraient le penser à tort certains, mais d'une prudence en vue d'un « discernement suffisant », c'est-à-dire un plus grand discernement.

Ainsi donc, en appliquant strictement le canon 579, en respectant le rescrit du Pape François qui appuie ledit canon et en suivant textuellement les conditions prévues (les étapes, les critères et les documents appropriés) ci-dessus, les évêques diocésains et les supérieurs religieux éviteront de multiplier les nouveaux instituts et échapperont aux problèmes rencontrés dans le passé.

Il ne sert à rien de s'opposer à l'enseignement de l'Église, mais il faut toujours chercher à demeurer en communion avec elle, justement en étant en conformité avec ses lois et en communion avec sa tête qui est le successeur de Pierre. Les évêques ne doivent pas oublier que, en voulant aider les Religieux à s'insérer selon leur charisme propre, dans la communion et l'action évangélisatrice de l'Église, ils doivent le faire en harmonie avec le Pontife Romain²² ; car c'est en union avec le Pape qu'ils ont reçu la charge du discernement des dons (voir *LG*, n° 21 ; *Mutuae relationes*, n° 9c).

²¹ Voir Site : <http://www.riposte-catholique.fr/perepiscopus/vatican/la-synodalite-attendra> (02/06/2016).

²² Voir SACREE CONGREGATION DES EVÊQUES, SACREE CONGREGATION DES RELIGIEUX ET DES INSTITUTS SECLIERES, Directives pour les rapports entre les évêques et les religieux dans l'Église *Mutuae relationes*, 14 mai 1978, dans *AAS*, 70 (1978), traduction française dans *DC*, 75 (1978), n°s 51 et 52.

ANNEXE

Rescriptum ex audientia en vue de l'érection des instituts diocésains de vie consacrée

La Congrégation pour les instituts de vie consacrée et les sociétés de vie apostolique, consciente que chaque nouvel institut de vie consacrée, même s'il voit le jour et se développe au sein d'une Église particulière, est un don fait à toute l'Église, constatant la nécessité d'éviter que ne soient érigés au niveau diocésain de nouveaux instituts sans le discernement suffisant qui en assure l'originalité du charisme, qui définisse les traits spécifiques qu'aura en eux la consécration à travers la profession des conseils évangéliques et qui en identifie les réelles possibilités de développement, a signalé l'opportunité de mieux déterminer la nécessité, établie par le can. 579 du C. de D. C., de demander son avis avant de procéder à l'érection d'un nouvel institut diocésain.

C'est pourquoi, suivant l'avis du Conseil pontifical pour l'interprétation des textes législatifs, le Saint-Père François, au cours de l'audience accordée au secrétaire d'Etat le 4 avril 2016, a établi que la consultation préalable du Saint-Siège doit être entendue comme nécessaire *ad validitatem* pour l'érection d'un institut diocésain de vie consacrée, sous peine de nullité du décret d'érection de l'institut même.

Le présent rescrit sera promulgué au moyen de sa publication dans *L'Osservatore Romano*, et entrera en vigueur le 1^{er} juin 2016, et sera ensuite publié sur les *Acta Apostolicae Sedis*.

Du Vatican, le 11 mai 2016.

Cardinal PIETRO PAROLIN
Secrétaire d'Etat

Rescriptum ex audientia on the Erection of Diocesan Institutes of Consecrated Life

The Congregation for the Institutes of Consecrated Life and the Societies of Apostolic Life, aware that every new institute of consecrated life, even if it comes to light and develops within a particular Church, is a gift granted to all the Church, and acknowledging the need to avoid the erection at diocesan level of new institutes without sufficient discernment to ascertain the originality of the charism, which defines the specific features to be consecrated in

them through the profession of evangelical counsels and identifies the real possibilities of development, has noted the opportunity of more clearly specifying the need, established by canon 579 of the Code of Canon Law, to request its opinion prior to proceeding with the erection of a new diocesan institute.

Therefore, following the advice of the Pontifical Council for Legislative Texts, the Holy Father Francis, in the audience granted to Cardinal Secretary of State Pietro Parolin on 4 April 2016, decreed that the prior consultation of the Holy See is to be considered necessary *ad validitatem* for the erection of a diocesan Institute of consecrated life, and that the lack thereof shall invalidate the decree for the erection of the same Institute.

The present *Rescriptum* shall be promulgated by publication in *L'Osservatore Romano* and shall enter into force on 1 June, and be published in the *Acta Apostolicae Sedis*.

From the Vatican, May 11, 2016

Cardinal PIETRO PAROLIN
Secretary of State

PROFESSION BY *VOTUM* OR BY *VINCULUM* IS ONE BOND BETTER THAN ANOTHER?

NANCY BAUER, OSB*

SUMMARY — Profession of the evangelical counsels of poverty, chastity, and obedience is constitutive of the state of consecrated life and profession of the counsels takes a number of different forms. According to Canon 573 §2, members of institutes of consecrated life profess the counsels *per vota aut alia sacra ligamina*—“by vows or other sacred bonds.” In particular, members of religious institutes undertake the counsels *per vota*, that is, by public vows, while members of secular institutes assume them by other sacred bonds referred to as *sacra vincula*. In addition to members of institutes of consecrated life, canonical hermits profess the evangelical counsels and, according to canon 603 §2, they do so “by vow or other sacred bond.” Finally, although not a form of consecrated life in the strict sense of the term, members of some societies of apostolic life assume the counsels by “some bond defined in the constitutions.” In this study, the author briefly traces the origin of the phrase, *per vota aut alia sacra ligamina* and then looks at the meaning of three relevant Latin terms—*votum*, *ligamen* and *vinculum*—as they relate to consecrated life. Finally, the author examines the specific canonical forms and effects of profession of the evangelical counsels within religious institutes, secular institutes, eremitical life, and societies of apostolic life.

RÉSUMÉ — La profession des conseils évangéliques de pauvreté, de chasteté et d’obéissance est constitutive de l’état de la vie consacrée, et la profession de ces conseils prend des formes différentes. Selon le canon 573 §2, les membres des instituts de vie consacrée professent des conseils *per vota aut alia sacra ligamina* — « par des vœux ou d’autres liens sacrés ». En particulier, les membres des instituts religieux engagent les conseils *per vota*, à savoir, par vœux publics, tandis que les membres des instituts séculiers les assument à partir d’autres liens sacrés appelés *sacra vincula*. En plus des membres des instituts de vie consacrée, les ermites canoniques professent les conseils évangéliques et, selon le canon 603 §2, ils le font « par

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un vœu ou par un autre lien sacré ». Enfin, bien qu'il n'existe pas une forme de vie consacrée dans le sens strict du terme, les membres de certaines sociétés de vie apostolique assument les conseils par « un certain lien défini dans les constitutions ». Dans cet article, l'auteure retrace brièvement l'origine de l'expression, *per vota aut alia sacra ligamina* puis explique le sens des trois pertinents termes latins — *votum*, *ligamen* et *vinculum* — comme ils se rapportent à la vie consacrée. Pour terminer, l'auteure examine les formes canoniques spécifiques et les effets de la profession des conseils évangéliques au sein des instituts religieux, les instituts séculiers, la vie érémitique et les sociétés de vie apostolique.

Introduction

According to canon 573, life is consecrated through profession of the evangelical counsels of poverty, chastity and obedience, and profession is made through vows or other sacred bonds.¹ The code specifies different forms of bonds for different forms of consecrated life. Specific to religious institutes is the centuries-old tradition of profession by “public vows” (c. 607 §2). Members of secular institutes, a relatively new form of consecrated life, profess the counsels by “sacred bonds” (c. 712). Canonical hermits, who observe a revived or, more accurately, revised form of consecrated life, profess the evangelical counsels “by vow or other sacred bond” (c. 603 §2). Finally, while societies of apostolic life are not, canonically speaking, institutes of consecrated life, the members of some societies assume the evangelical counsels by “some bond defined in the constitutions” (c. 731 §2).²

¹ *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus*, Vatican City, Libreria Editrice Vaticana, 1983. English translation from *Code of Canon Law, Latin-English Edition: New English Translation*, Washington, D.C., CLSA, 1998. All subsequent English translations of canons from this code will be taken from this source.

² Prior to the Second Vatican Council, the term “states of perfection” was commonly used in reference to institutes and societies in which members professed the evangelical counsels. The term “consecrated life” was adopted by the council and reinforced through the process of revising the Code of Canon Law. Strictly speaking, the state of consecrated life includes members of religious and secular institutes and canonical hermits, all of whom profess the evangelical counsels in some form. Societies of apostolic life are not, in the strict canonical sense, a form of consecrated life. They are said to resemble institutes of consecrated life but pursue their apostolic purpose without religious vows (c. 731 §1). They are included in this paper because, in some societies of apostolic life, the members assume the evangelical counsels by some bond defined in their constitutions (c. 731 §2). Consecrated virgins living in the world (c. 604), while they make a *propositum* regarding chastity, do not explicitly profess poverty and obedience. They are consecrated by the rite of consecration itself, especially by the bishop’s prayer of consecration. Because they do not make a profession of the evangelical counsels, consecrated virgins are not addressed in this study.

Why this medley of vows and bonds? Why does the legislator prescribe different means to profess the same three counsels? Is there a distinction in the juridic effects of a profession made by vows and one made by other sacred bonds? What exactly are these other bonds? This paper attempts to answer these questions. We will begin by looking at the origin of the phrase “by vows or other sacred bonds” in *Lumen gentium*, followed by an excursus on three relevant Latin terms used in the code: the Latin term for vow, which is *votum*; and two Latin terms that are both translated into English as “bond”—*ligamen* and *vinculum*. Then we will look more closely at the public vows of religious, then the sacred bonds of secular institutes, the vows or sacred bonds of canonical hermits, and finally the bonds defined in the constitutions of societies of apostolic life. This study will not delve into the meaning of the counsels themselves but rather how those counsels are professed or assumed. The study will be confined to the Latin code.

1 — *Lumen gentium: Per vota aut alia sacra ligamina*

The Second Vatican Council’s theological understanding of consecrated life is contained in Chapter VI of *Lumen gentium*, articles 43-47. Although the chapter is entitled, “Religious,” it is regarded as referring not only to religious in the strict sense but also to members of secular institutes and societies of apostolic life. *Lumen gentium* 43 affirms that the evangelical counsels of chastity, poverty and obedience are based on the teaching and example of Christ.³ *Lumen gentium* 44 asserts that those who bind themselves to the practice of the counsels “by vows or other sacred bonds which are similar to vows”—*per vota aut alia sacra ligamina, votis propria sua ratione assimilata*—consecrate themselves wholly to God.⁴

The phrase, *per vota aut alia sacra ligamina*, did not appear in *Lumen gentium* until its final iteration. The first schema of the constitution on the Church, presented to the council fathers in November 1962, recognized the evangelical counsels as constitutive of religious life and asserted that profession of the counsels by vow was better than profession by promise, and that a perpetual bond (*ligamine perpetuo*), that is, perpetual profession, was better than a temporary bond (*vinculo temporaneo*), that is, temporary profession.⁵

³ VATICAN COUNCIL II, dogmatic constitution *Lumen gentium* 43, November 21, 1964, in AAS, 57 (1965), 49.

⁴ LG 44.

⁵ VATICAN COUNCIL II, *Acta Synodalia Sacrosancti Concilii Oecumenici Vaticani II*, vol. 1, pars 4, Vatican City, Typis Polyglottis Vaticanis, 1971, 36 (= *Acta Synodalia*). “Quare suapte

The revised schema, presented to the council fathers in September 1963, did not use the terms “vow” or “promise” but asserted that “public profession” by a perpetual bond (*ligamine perpetuo*) was better than by a temporary bond (*vinculo temporaneo*).⁶ The July 1964 schema of the constitution on the Church repeated what was said in the 1963 schema.⁷

A significant change occurred with final revisions of the 1964 schema with the addition of the following. “Through vows (*per vota*), by which the religious obligates himself to the three evangelical counsels, he consecrates himself totally to God, who is loved above all, so that he is dedicated to the service and honor of God by a new and special title.... This consecration will be the more perfect in as much as the indissoluble bond (*vinculum*) of the union of Christ and His bride, the Church, is represented by more firm and more stable bonds (*vincula*).”⁸ Finally, the phrase *aut alia sacra ligamina* was added to *per vota* at the request of council fathers who recognized that *per vota* referred to profession by religious but excluded members of societies of apostolic life. In order to include these societies, they suggested adding *vincula* or *ligamina* as means of professing the evangelical counsels.⁹ The term *ligamina* was chosen. Thus the first sentence of the promulgated *Lumen gentium* 44 begins: “Through vows (*per vota*) or other sacred bonds (*sacra ligamina*) which are similar to vows, by which a member of the Christian faithful obligates himself to the evangelical counsels, he consecrates himself totally to God, who is loved above all, so that he is dedicated to the service and honor of God by a new and special title.”¹⁰

natura haec observantia melior est ex voto quam ex promissione, cum ligamine perpetuo quam cum vinculo temporaneo assumpta.”

⁶ *Acta Synodalia*, vol. II, pars 1, 273. “Professio vero publica ... melior est cum ligamine perpetuo quam cum vinculo temporaneo suscepta.”

⁷ *Acta Synodalia*, vol. III, pars 1, 313.

⁸ *Ibid.*, 311. “Per vota, quibus religiosus ad tria praedicta consilia evangelica se obligat, Deo summe dilecto totaliter mancipatur, ita ut ipse omniaque sua ad Dei servitium Eiusque honorem novo et peculiari titulo referantur.... Tanto autem perfectior erit consecratio, quo per firmiora et stabiliora vota magis repraesentatur Christus cum sponsa Ecclesia indissolubili vinculo coniunctus.”

⁹ *Acta Synodalia*, vol. III, pars 8, 130. “15 Patres rogant ut in toto numero 44 *terminologia mutetur*, non adhibendo solummodo vocem: ‘vota’, sed alternis vicibus dicendo sive: ‘vincula’, sive: ‘ligamina’ ... *Ratio*: Ne sodales Societatum *sine votis* sibi persuasum habeant se non esse implicatos in tota hac paragrapho.”

¹⁰ *LG* 44. “Per vota aut alia sacra ligamina, votis propria sua ratione assimilata, quibus christifidelis ad tria praedicta consilia evangelica se obligat, Deo summe dilecto totaliter mancipatur, ita ut ipse ad Dei servitium Eiusque honorem novo et peculiari titulo referatur.”

2 — *An Excursus on Terminology: Votum, Ligamen, Vinculum*

Members of religious institutes have professed the evangelical counsels *per vota* since the Middle Ages. *Lumen gentium* introduces the term *sacra ligamina* to refer to other “sacred bonds” by which the counsels are professed. The 1983 code uses both *vinculum* and *ligamen* when referring to the various bonds by which the counsels are undertaken. The purpose of this excursus on terminology is to gain a better understanding of these terms—*votum*, *ligamen*, and *vinculum*—as they are used in relation to institutes of consecrated life and societies of apostolic life.

2.1 — *Votum*

Latin dictionaries define *votum* as “a solemn promise made to some deity”¹¹ or “devoting oneself to God.”¹² As a verb, *voveo* means to vow; to promise solemnly or sacredly; to devote (*devoveo*), dedicate, or consecrate something to a deity.¹³ In the 1983 Code of Canon Law, a vow is “a deliberate and free promise made to God about a possible and better good” which “must be fulfilled by reason of the virtue of religion.”¹⁴ Anyone who has the use of reason is capable of making a vow, unless otherwise prohibited by law (c. 1191 §2); however, a vow made out of grave and unjust fear or *dolus* is *ipso iure* null (c. 1191 §3). Vows are further specified as public or private, solemn or simple,¹⁵ personal or real. For purposes of this study, we will look only at the distinction between public and private vows. “A vow is *public* if

¹¹ Charlton T. LEWIS, *Lewis and Short: A Latin Dictionary*, Oxford, The Clarendon Press, 1955, 2014.

¹² William SMITH and Theophilus D. HALL, *A Copious and Critical English-Latin Dictionary*, New York, American Book Company, 1871, 930.

¹³ *Lewis and Short: A Latin Dictionary*, 2015.

¹⁴ Canon 1191 §1. “Votum, idest promissio deliberata ac libera Deo facta de bono possibili et meliore, ex virtute religionis impleri debet.” Canon 1191 §1 is identical to canon 1307 §1 of the 1917 code. This definition of a vow goes back at least to Thomas Aquinas in the thirteenth century. For a theological study of Aquinas’ definition of a vow, see Cronan REGAN, *Religious Vows in the Life of the Church: Dissertatio ad lauream in Facultate S. Theologiae apud Pontificium Athenaeum “Angelicum” de Urbe*, Scranton, 1962 (=REGAN, *Religious Vows*).

¹⁵ The 1917 code distinguished between religious who made solemn vows and those who made simple vows. The *coetus* assigned to revise the canons on consecrated life elected to discontinue this distinction in the universal law.

a legitimate superior accepts it in the name of the Church; otherwise it is *private*.”¹⁶

The canons on vows appear in Book IV of the code, “The Sanctifying Function of the Church,” in Part II, “Other Acts of Divine Worship.” Thus, the profession of the evangelical counsels by vow is first and foremost an act of divine worship. “Whatever is promised to God, is promised out of reverence for God, since it is promised in order to be offered to God. Now, reverence for God pertains to the worship of God, and hence a vow pertains to the worship of God. It is an act of the virtue of religion by which worship is given to God.”¹⁷ From a theological perspective, professing the evangelical counsels by public vows has always been considered a highly religious act, more in the realm of the supernatural than the natural, a promise made to God, not to a mere human. Despite the spiritual impulse for making a vow, canonists have also always recognized profession of the evangelical counsels by vow as a contract that gives rise to “a whole series of reciprocal rights and obligations between the institute and the religious.”¹⁸

¹⁶ Canon 1192 §1. “Votum est *publicum*, si nomine Ecclesiae a legitimo Superiore acceptetur; secus *privatum*.” The same distinction between a public and private vow appeared in canon 1308 §1 of the 1917 code.

¹⁷ REGAN, *Religious Vows*, 53.

¹⁸ T. Lincoln BOUSCAREN and Adam C. ELLIS, *Canon Law: A Text and Commentary*, 3rd rev. ed., Milwaukee, The Bruce Publishing Company, 1957, 267. See also Matthew RAMSTEIN, *A Manual of Canon Law*, Hoboken, NJ, Terminal Printing & Publishing Co., 1947, 348. “Viewed as a spiritual holocaust, religious profession is also a quasi-contract between the individual and God. Viewed as a bilateral contract between the individual and the organization, religious profession promises obedience according to the rule and constitutions on the part of the individual, while the organization pledges itself to maintain and care for the religious.” For a history of the development of religious profession by vows, see John M. LOZANO, *Discipleship: Towards an Understanding of Religious Life*, trans. Beatrice WILCZYNSKI, Chicago, Claret Center for Resources in Spirituality, 1980, 259-286. According to LOZANO, when profession by *vota* became common, there was greater emphasis on the contractual aspect. LOZANO, *Discipleship*, 275. See also *Revue de Droit Canonique*, 65/1 (2015) which is devoted entirely to “Les vœux religieux: Histoire et actualité.” See also Matias AUGÉ who describes historical models of the rite of religious profession in three basic stages corresponding to the three major historical forms of religious life, i.e., monastic, mendicant, and modern congregations. AUGÉ refers to the monastic form as *professio super altare* because it took place near the altar, the mendicant form as *professio in manibus* because the rite included the feudal gesture of the candidate placing his hands in those of the superior, and the form adopted by the Society of Jesus and modern congregations as *professio super hostiam*, because the profession was made during the Eucharist before the reception of communion while the priest held up the consecrated host. Matias AUGÉ, “The Rite of Religious Profession in the West,” in Anscar J. CHUPUNGO (ed.), *Handbook for Liturgical Studies*, vol. IV, *Sacraments and Sacramentals*, Collegeville, MN, The Liturgical Press, 2000, 315-330.

2.2 — *Ligamen* and *vinculum*

Two different Latin terms—*ligamen* and *vinculum*—are used in the canons on institutes of consecrated life and societies of apostolic life, and both are translated into English as “bond.”¹⁹ This excursus on these two Latin terms is undertaken to discern whether they are completely interchangeable or whether there is some distinction between them that is relevant to consecrated life.

Latin dictionaries define both *ligamen* and *vinculum* in terms of the bonds of relationship. *Ligo* means to unite in harmony or kinship, to confirm or cement an alliance.²⁰ It also means to fasten or to bind and is a basis for *religio*, a religious practice, and *religiosus*, religious.²¹ *Vincio* means to tie up or bind.²² *Vinculum* is a force or impulse uniting people, a link, or a bond, especially of friendship and kinship; it is that which cements or safeguards a relationship or an agreement.²³ Both *ligamen* and *vinculum* also refer to material objects that bind or tie things together. *Ligamen* is a string, bandage, or fastening and is the source of the term “ligament,” a connective tissue in the human body.²⁴ *Vinculum* can be a rope or band but more often something that decisively restricts movement, such as a yoke, a chain, or shackles or fetters of a prisoner.²⁵ In international law, *vinculum iuris*, which is based in Roman law, means “chain of law” and refers to the “binding nature of law” or to a “specific, legally binding obligation.”²⁶

2.2.1 – *Ligamen* and *Vinculum* in Pre-Vatican II Usage

In traditional ecclesiastical usage, the phrase *ligandi aut solvendi* refers to the ecclesiastical power of binding or loosing of sin. The phrase appeared in that sense several times in Gratian’s *Decretum*.²⁷ The word *vinculum* also

¹⁹ Other vernacular translations of the 1983 *Code of Canon Law* also use a single word to translate both *ligamen* and *vinculum* in the canons on institutes of consecrated life and societies of apostolic life. In German, the noun *Bindung* is used; in French, *lien*; in Italian, *vincolo*; and in Spanish, *vincolo*.

²⁰ *Oxford Latin Dictionary*, vol. 5, Oxford, The Clarendon Press, 1976, 1030.

²¹ Michiel DE VAAN, *Etymological Dictionary of Latin and the Other Italic Languages*, Brill, Leiden and Boston, 2008, 341.

²² *Ibid.*, 679.

²³ *Oxford Latin Dictionary*, vol. 5, 2065.

²⁴ *Ibid.*, 1029.

²⁵ *Ibid.*, 2065.

²⁶ Aaron X. FELLMETH and Maurice HORWITZ, *Guide to Latin in International Law*, Oxford, Oxford University Press, 2009, 294.

²⁷ For example, C. 8 q.1 c.1; C. 24 q.1 c. 20; and C.11 q. 3 c. 88.

appeared in the *Decretum*, for example, in reference to the bond of charity,²⁸ the bond or chain of sin,²⁹ and the conjugal bond.³⁰

The term *vinculum* occasionally appeared in Church documents on consecrated life prior to the Second Vatican Council. In his 1899 encyclical *Testem benevolentiae*, Pope Leo XIII used the phrase, *nullo votorum vinculum*—without the bond or obligation of vows—to describe societies of apostolic life.³¹ In 1900, Pope Leo XIII, in his apostolic constitution *Conditae a Christo*, recognized congregations with the sacred bonds, *sacra vincula*, of simple vows as a form of religious life.³² Pope Pius XII in his 1947 apostolic constitution *Provida Mater Ecclesia* gave canonical recognition to secular institutes. To distinguish them from religious institutes, he noted that they do not have the “three public religious vows” but profess the counsels by other means.³³ He referred to the “permanent bond” (*vinculum*) of obedience³⁴ and the bond (*vinculum*) of incorporation.³⁵

2.2.2 — Ligamen and Vinculum in Conciliar and Post-Conciliar Documents

We have already seen that *ligamen* was used in the earliest schemata of the Dogmatic Constitution on the Church to refer to perpetual bonds, while *vinculum* was used to refer to temporary bonds. However, in conciliar deliberations, that distinction was not used consistently and the terms were sometimes used interchangeably.³⁶ The phrase that finally appears in *Lumen*

²⁸ De pen. D. 3 c. 32.

²⁹ D. 23 c. 1.

³⁰ For example, C. 32 q. 7 c. 1 and C. 33 q. 1 d.a.c. 1.

³¹ LEO XIII, encyclical *Testem benevolentiae*, January 22, 1899, in AAS, 31 (1898-99), 478. “Si qui igitur hoc magis adamant, nullo votorum vinculo, in coetum unum coalescere, quod malint, faxint; nec novum id in Ecclesia nec improbabile institutum.”

³² LEO XIII, apostolic constitution *Conditae a Christo*, December 8, 1900, in AAS, 33 (1900-01), 341: “... sacro votorum simplicium suscepto vincula.”

³³ PIUS XII, apostolic constitution *Provida Mater Ecclesia*, art. II §1, February 2, 1947, in AAS, 39 (1947), 120 (= *PME*). “Instituta saecularia, cum nec tria publica religionis vota ... admittant.”

³⁴ *PME*, art. III §2, 2°. “Obedientiae ... ita ut stabili vinculo.”

³⁵ *PME*, art. III §3. “Quoad incorporationem Sodalium Instituto proprio et quoad vinculum ex ipsa ortum.”

³⁶ For example, while the 1963 schema referred to perpetual *ligamen* and temporary *vinculum*, a note attached to the schema referred to *vinculum perpetuum*. See *Acta Synodalia*, vol. II, pars 1, *Notae* 21, 271. Also, when the fifteen council fathers requested that *vincula* or *ligamina* be added to *per vota* in the final draft of LG 44 to include societies of apostolic life, they were using the terms interchangeably. See *Acta Synodalia*, vol. III, pars 8, 130: “sive ‘vincula’, sive ‘ligamina’.”

gentium 44, *per vota aut alia sacra ligamina*—through vows or other sacred bonds—clearly indicates that the public vows of religious are a form of *ligamina*, as are the *vinculum* of secular institutes and societies. In *Lumen gentium*, at least, *ligamina* is an umbrella term that covers both *votum* and *vinculum*.

One post-conciliar document on consecrated life is notable for its interchangeable use of *ligamen* and *vinculum*. *Renovationis causam*, the 1969 Instruction on the Renewal of Religious Formation, twice quotes the phrase from *Lumen gentium* 44: *per vota aut alia sacra ligamina votis propria sua ratione assimilata*.³⁷ In its many references to temporary profession, *Renovationis causam* sometimes uses *vinculum*³⁸ and sometimes *ligamen*.³⁹

2.2.3 — *Ligamen and Vinculum in the 1983 Code of Canon Law*

During the code revision process, the *Coetus de Institutis perfectionis* made little, if any, distinction between *ligamen* and *vinculum*. The terms were used interchangeably in the 1977 “Schema of Canons on Institutes of Life Consecrated by Profession of the Evangelical Counsels.”⁴⁰ In the 1983 code, the term *ligamen* is used four times, always in relation to consecrated life. It is used in Part I of Book II on “The Christian Faithful” in canon 207 §2. The first paragraph of canon 207 notes that, by divine institution, the Christian faithful are either clerics or lay persons. The second paragraph, quoting *Lumen gentium*, explains that there are members of both of these groups who profess the evangelical counsels *per vota aut alia sacra ligamina*.

³⁷ SACRED CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES, instruction *Renovationis causam* 2, 13, January 6, 1969, in AAS, 61 (1969), 106, 113 (=RC).

³⁸ RC 2: “pro votis temporariis alius generis vincula;” RC 4: “primum vinculum temporarium;” RC 6: “temporariis vinculis aliqui ... vinculorum temporariorum;” RC 38: “vinculum temporarium.”

³⁹ RC 6: “votorum temporariorum vel ... alius generis ligaminibus;” RC 7: “pro votis temporariis alius generis ligamina ... alio temporario ligamine quam votis ... Quaecumque autem est temporarii huius ligaminis forma;” RC 10: “votis vel aliis ligaminibus temporariis;” RC 24: “primis votis vel temporariis ligaminibus;” RC 34: “loco votorum temporariorum, alius generis ligamina;” RC 35: “ut temporarium eiusmodi ligamen iam ad tria consilia evangelica exercenda referatur;” RC 36: “temporarii ligaminis;” RC 37: “tempus votorum vel ligaminum;” RC 38: “vota temporaria vel ad alius generis ligamina.”

⁴⁰ This caught the attention of the task force of the Canon Law Society of America that was charged with reviewing the schema. The task force complained about the inconsistency and confusion created by using the terms interchangeably, but it did not indicate whether the terms should not be used interchangeably because there was a canonical difference between them. *Task Force Critiques of the Initial Schemata for the Revision of the Code of Canon Law*, Washington, D.C., CLSA, 1972-1978, 102.

The other three uses of *ligamen* are contained within Part III of Book II on “Institutes of Consecrated Life and Societies of Apostolic Life,” and specifically within the first title, “Norms Common to All Institutes of Consecrated Life.” Canon 573, the introductory canon, describes the conciliar theological understanding of consecrated life in its first paragraph, while the second paragraph, again quoting *Lumen gentium*, contains juridical elements of consecrated life, including profession of the evangelical counsels *per vota aut alia sacra ligamina*. Canon 587 §1 prescribes that constitutions of institutes of consecrated life must contain the proper object of the sacred bonds (*sacrorum ligaminum*). Finally, canon 603 §2 prescribes that hermits profess the evangelical counsels *vota vel alio sacro ligamine*.

In all of the canons on consecrated life and societies of apostolic life other than those in the common norms, the term *vinculum* is used.⁴¹ It is used twice in the canons specific to religious institutes,⁴² nine times in the canons on secular institutes,⁴³ and once in the canons on societies.⁴⁴

In summary, as in *Lumen gentium*, within the context of the promulgated canons on consecrated life, *ligamen* is an umbrella term that includes *votum* and *vinculum*. However, *ligamen* and *vinculum* are both relatively new in relation to consecrated life: *vinculum* is introduced as a juridical term in 1947 in *Provida Mater Ecclesia* in relation to secular institutes; *ligamen* is introduced in *Lumen gentium* in relation to all the various forms of professing the evangelical counsels. In the drafting of both the conciliar document and the code, the two terms were sometimes used interchangeably. It is likely that, over time, greater specificity will be applied to each term. That greater specificity may give a more religious sense to the term *ligamen* and a greater juridical sense to *vinculum*.⁴⁵ This is based on two factors: first, *ligamen* and

⁴¹ *Vinculum* is used elsewhere in the code and with a variety of meanings. Canon 205 defines full communion with the Catholic Church: “vinculis nempe professionis fidei, sacramentorum et ecclesiastici regiminis.” Canon 275 §1 calls on clerics to be united among themselves *vinculo fraternitatis et orationis*. Pontifical legates are to strengthen the bonds of unity—*unitatis vincula*—between the Apostolic See and particular churches (c. 364). *Vinculum* is used in the canons on the marriage bond (see, for example, c. 1134) and the bond of sacred ordination (1425 §1, 1°). The sacrament of confirmation binds (*vinculat*) the baptized more perfectly to the Church (c. 879). Bishops, *ratione vinculi unitatis et caritatis*, are to assist the Apostolic See in acquiring the temporal goods it needs to fulfill its service to the universal Church (c. 1271).

⁴² Canons 643 §1, 3° and 696 §1.

⁴³ Canons 712; 720; 721 §1, 2°; 722 §3; 723 §§1,3; 724 §1; 726 §1; and 728.

⁴⁴ Canon 731 §2.

⁴⁵ Anastasio GUTIÉRREZ, in a study of the terms *ligamen* and *vinculum* in relation to consecrated life, concludes that their use in *Lumen gentium* and the code are “substantially identical.” He points out, for example, that *ligamina* is used in the first part of the first

religio share an etymological basis; second, *vinculum* has a foundation in Roman law as a legally binding obligation.

3 — *Religious Institutes: Public Vows*

Canon 607 §2 of the 1983 code describes a religious institute as a society in which the members pronounce public vows.⁴⁶ As noted above, a vow is a promise made to God, and a public vow is one that is received by a legitimate superior in the name of the Church. The first paragraph of canon 607 provides the theological context in which to reflect on the nature of religious profession: it is a consecration of the whole person and a total self-giving.⁴⁷

Canon 654 identifies the specific theological and juridical effects of profession in a religious institute. “By religious profession, members assume the observance of the three evangelical counsels by public vow, are consecrated to God through the ministry of the Church, and are incorporated into the institute with the rights and duties defined in law.”⁴⁸ The theological effect of religious profession is that a person is consecrated to God. Consecration, as described in canon 573 §1, includes the following: total dedication to God who is loved above all, self-donation of one’s total existence to God, dedication to service of the Church and all humankind, and a sign to the Church and world of the age to come.

Canon 654 identifies two juridical effects of religious profession. The first is assumption of the evangelical counsels by public vow. The manner of observing each of the three evangelical counsels is defined in universal law, especially in canons 599-601, and in the proper law of each institute (cc. 587 §1 and 598 §1). The second juridical effect of religious profession is incorporation into the institute with all the rights and duties defined by

paragraph of *Lumen gentium* 44 while *vinculum* is used toward the end of the paragraph in reference to the bonds of profession. GUTIÉRREZ does note that there seems to be more of a religious nature to the term *ligamen*, given the etymological connection with *religio*. Anastasio GUTIÉRREZ, “I vincoli sacri negli istituti di vita consecrata,” in *CpR*, 67 (1986), 322-323.

⁴⁶ Canon 607 §2. “Institutum religiosum est societas in qua sodales ... vota publica ... nuncupant.”

⁴⁷ Canon 607 §1. “Vita religiosa, utpote totius personae consecratio, mirabile in Ecclesia manifestat conubium a Deo conditum, futuri saeculi signum. Ita religiosus plenam suam consummat donationem veluti sacrificium Deo oblatum, quo tota ipsius exsistentia fit continuus Dei cultus in caritate.”

⁴⁸ Canon 654. “Professione religiosa sodales tria consilia evangelica observanda voto publico assumunt, Deo per Ecclesiae ministerium consecrantur et instituto incorporantur cum iuribus et officiis iure definitis.”

law.⁴⁹ The profession gives rise to rights and duties on the part of the individual religious and on the part of the institute. For example, each member of a religious institute has the obligation of submitting his or her salary to the institute (c. 668 §3), while the institute has the obligation of providing for the needs of each member (c. 670).

It is important to note that there is a difference between “profession” and “vows.” Profession is the external expression of one’s inner resolve to offer oneself to God in religious life in a particular institute. A religious profession gives rise to all of the theological and juridical effects mentioned in canon 654. It is only the three evangelical counsels that are assumed by vow, that is, by a promise made to God, which is an act of divine worship. The evangelical counsels are constitutive of religious life but are not the entirety of life in a religious institute. Members are obliged to observe the whole patrimony of the institute (c. 578), which is expressed in normative fashion in the constitutions (c. 587). Thus, a typical profession formula usually includes not only vows to observe the evangelical counsels but a commitment to live according to the constitutions of the institute.

That the vows of religious are public means they are accepted in the name of the Church by a legitimate superior. The superior competent to receive the vows, usually a major superior, is identified in the institute’s constitutions. The public nature of vows indicates the ecclesial connection of religious life. For example, it is for ecclesiastical authority to interpret the evangelical counsels and direct their practice by laws (c. 576). It is also for ecclesiastical authority, either the diocesan bishop or the Apostolic See, to dispense from perpetual public vows made by religious (c. 691 §2). A major juridic effect of the public perpetual vow of chastity in a religious institute is that it constitutes a diriment impediment to marriage (c. 1088). If a public perpetual vow of chastity is made in a religious institute of pontifical right, dispensation from the impediment is reserved to the Apostolic See (c. 1078 §2, 1°). A religious who, without a dispensation, contracts marriage or attempts to contract marriage, is *ipso facto* dismissed from the institute (c. 694) and may incur a *latae sententiae* interdict (c. 1394 §2).

⁴⁹ “Incorporation is a technical canonical term referring to a formal action recognized in law by which a person becomes a member (*sodalis*) of the institute or society, with the related rights and obligations membership entails.” Elizabeth McDONOUGH, “Incorporation into an Institute of Consecrated Life or a Society of Apostolic Life,” in *Review for Religious*, 60 (2011), 206-207.

4 — *Secular Institutes: Sacred Bonds*

According to canon 712, the constitutions of a secular institute are to establish the sacred bonds (*vincula sacra*) by which members assume the evangelical counsels.⁵⁰ The canons do not give any further specification regarding possible forms of those sacred bonds. Since *Provida Mater Ecclesia* is a source of the canon, it can be assumed that the forms identified therein are applicable. Therefore, profession of chastity can be made in the form of a vow, oath, or consecration binding in conscience, while the counsels of poverty and obedience can be assumed by a vow or promise.⁵¹

At the time that *Provida Mater Ecclesia* was promulgated, profession of the evangelical counsels by these various means was unprecedented and, therefore, lacked the kind of canonical clarity that public religious vows had acquired over the centuries. Canonists hoped that the 1983 code would provide greater clarity,⁵² but there are still questions about the nature of some of these sacred bonds. Above all, there was and still is uncertainty about the nature of vows in a secular institute. *Provida Mater Ecclesia* excludes members of secular institutes from making public vows, so it would seem these vows are private. However, canonists debate whether a vow made in an institute of consecrated life that is approved by ecclesiastical authority can really be “merely private.”⁵³ Some of the first canonists to comment on *Provida Mater Ecclesia*, such as René Carpentier, described the nature of these vows as “essentially private,”⁵⁴ but others, such as Emile Bergh, argued that they must have “some official character”; they “are not ignored

⁵⁰ Canon 712. “... constitutiones statuant vincula sacra, quibus evangelica consilia in instituto assumuntur.”

⁵¹ *PME*, art. III §2. “1°. Professione nempe coram Deo facta coelibatus et castitatis perfectae, quae voto, iuramento, consecratione in conscientia obliganti, ad normam Constitutionum, firmetur; 2°. Obedientiae voto vel promissione ... 3°. Paupertatis voto vel promissione.” The constitutions of the Missionaries of the Kingship of Christ, a secular institute for women founded in Assisi in 1919 by Armida Barelli and Father Agostino Gemelli, prescribe a vow for the evangelical counsel of chastity and a promise for poverty and obedience. The profession is renewed annually. *Constitutions of the Secular Institute of the Missionaries of the Kingship of Christ*, art. 15, Rome, 2008, 21.

⁵² Sharon HOLLAND, *The Concept of Consecration in Secular Institutes*, Rome, C.M.I.S., 1981, 364 (=HOLLAND, *The Concept of Consecration*).

⁵³ *Ibid.*, 81. Holland reviews in some detail the initial canonical debate on the nature of vows in a secular institute following promulgation of *Provida Mater Ecclesia*. See HOLLAND, *The Concept of Consecration*, 80ff.

⁵⁴ *Ibid.*, 83-84.

by the Church.”⁵⁵ Arcadio Larraona and Anastasio Gutiérrez described the vows as something between public and private, using the terms “private-recognized” and “semipublic.”⁵⁶ Salvador Canals referred to them as “semi-public,” “private recognized,” and “social.”⁵⁷ Antoine Delchard called them “juridically recognized.”⁵⁸ The 1983 code did not solve the issue. The canons on vows still describe them as either public or private. There is no mention of a semi-public vow or a private vow that is “recognized.” The possibility of legislating for a third kind of vow that would apply to secular institutes came up during the code revision process, but it was deemed premature to introduce a new category.⁵⁹

Another question regarding the sacred bonds in a secular institute concerns the possibility of assuming the evangelical counsel of chastity by means of consecration. It is not clear if this refers to the traditional rite of consecration of virgins or if there is the possibility of assuming the counsel of chastity by some other form of consecration. Historically, the rite of consecration applied only to women and, in 1947 when *Provida Mater Ecclesia* was promulgated, the rite was available only to cloistered nuns, not to lay women living in the world. The 1970 revision of the rite, following the directives of the Vatican II Constitution on the Sacred Liturgy *Sacrosanctum concilium*, provides for consecration of nuns and women living in the world. According to canon 604 of the 1983 code, it is the diocesan bishop who admits women living in the world to consecration and decides on the conditions under which they are to undertake a life of perpetual

⁵⁵ Ibid., 87. Joseph Creusen described private vows as “ignored by the Church’s juridical authority.” See HOLLAND, *The Concept of Consecration*, 86.

⁵⁶ Ibid., 91-92, 96.

⁵⁷ Ibid., 94.

⁵⁸ Ibid., 98.

⁵⁹ Tomás RINCÓN-PÉREZ, “Commentary on Canon 712,” in *Exegetical Comm*, 2/1, 1918. See also *Comm*, 12 (1980), 375. Because the 1983 code does not identify a form of vow other than public or private, canonists continue to debate the nature of vows made in secular institutes. See, for example, Sharon HOLLAND, “Secular Institutes,” in *CLSA Comm*2, 880. “While institutes that use vows do not necessarily receive them ‘in the name of the Church’ as public vows, the regulation of these vows by the code and proper law, and the manner of dispensing from their obligations, argue against calling them purely private vows.” According to Jean BEYER, the vows are public: “Are the sacred bonds assumed in a secular institute according to canon 723 §1 ‘public?’ Can they be called ‘private?’ These secular institutes are now approved by the Church as a form of consecrated life (canon 605 §1) if they have been erected and approved by competent authority, their constitutions have been accepted by the Church, and their vows or other sacred bonds are approved. The answer to the first question is affirmative: they are public, not private.” Jean BEYER, “De novo iure circa vitae consecratae instituta et eorum sodales quaesita et dubia solvenda,” in *Periodica*, 73 (1984), 552.

virginity. In this form, it is recognized as an individualized state of consecrated life, distinct from religious and secular institutes. However, the Sacred Congregation for Divine Worship, in response to questions about the revised rite, affirmed that it is available to nuns, women belonging to secular institutes, and other lay women.⁶⁰ Because the rite of consecration of virgins does not include profession of the evangelical counsels of poverty and obedience, a woman who is a member of a secular institute who is consecrated by this rite would be required to profess poverty and obedience by other means. Furthermore, the rite of consecration is available only to women who have never been married.⁶¹ Therefore, a formerly married woman who enters a secular institute is not able to undertake the evangelical counsel of chastity by means of this rite.

Provida Mater Ecclesia allows for profession of the evangelical counsel of chastity, but not of poverty and obedience, by means of an oath. An oath, according to canon 1199 §1 of the 1983 code is “the invocation of the divine name in witness to the truth.”⁶² In taking an oath, a person “freely swears to do something” and “is bound by a special obligation of religion” to fulfill what he or she has sworn to do.⁶³ In other words, God witnesses a person’s expressed intention to remain celibate, chaste and continent but is not the recipient of anything, such as a promise.

Finally, *Provida Mater Ecclesia* provides for profession of the evangelical counsels of poverty and obedience, but not chastity, in the form of a promise. While the 1917 and 1983 codes describe the nature of a vow as a promise made to God, neither code provides for, let alone defines, a “promise” that is not a vow, that is, a promise that is not made to God. According to Jean Beyer, a promise is made to the institute “since a promise made to God is necessarily a vow.”⁶⁴ However, Beyer adds that a promise to practice the evangelical counsels is at least indirectly made to God: “Made for God, if not to God, it is by its very object an act of religion.”⁶⁵

⁶⁰ SACRED CONGREGATION FOR DIVINE WORSHIP, “Queries 1, Reply 1,” in *Documents on the Liturgy 1963-1979: Conciliar, Papal, and Curial Texts*, Collegeville, MN, The Liturgical Press, 1982, 1026- 1027.

⁶¹ *Ordo consecrationis virginum*, in *Pontificale Romanum ex decreto Sacrosancti Oecumenici Concilii Vaticani II instauratum, auctoritate Pauli PP. VI promulgatum, Praenotanda 5a*, May 31, 1970, Rome, Typis Polyglottis Vaticanis, 1970. English translation in *The Rites of the Catholic Church*, vol. 2, Collegeville, MN, The Liturgical Press, 1991, 158.

⁶² Canon 1199 §1. “Iusiurandum, idest invocatio Nominis divini in testem veritatis.”

⁶³ Canon 1200 §1. “Qui libere iurat se aliquid facturum, peculiari religionis obligatione tenetur implendi, quod iureiurando firmaverit.”

⁶⁴ Jean BEYER, *Religious Life or Secular Institute*, Rome, Gregorian University Press, 1970, 31.

⁶⁵ *Ibid.*

The effects of profession of the counsels by sacred bonds in a secular institute are identified in universal and proper law. As institutes of consecrated life, the profession effects consecration as it is described in canon 573 §1. The obligations attached to each of the evangelical counsels in a secular institute, just as in a religious institute, are found in the universal law (cc. 599-601) and proper law (c. 598 §1). Incorporation into the institute, with rights and obligations, accompanies assumption of the evangelical counsels (c. 723). The bonds cease only by grant of an indult of departure from the diocesan bishop or Apostolic See (cc. 727-728).

In one significant way, the canons distinguish between the effects of the public perpetual vow of chastity in a religious institute and the sacred bond of chastity in a secular institute: the bond of chastity in a secular institute, regardless of the means by which it is assumed, does not constitute a diriment impediment to marriage. During the code revision process, the *Coetus Studiorum de iure matrimoniali* considered extending the marriage impediment to perpetual profession of chastity by all forms of *sacra ligamina*, not only vows, because consecration is effected by all of the various forms.⁶⁶ This suggestion was rejected and the consultors then voted in favor of the impediment applying to a “public perpetual vow of chastity in an institute of consecrated life.”⁶⁷ However, the Code Commission restricted the impediment to religious institutes.⁶⁸ Therefore, without a dispensation from the bond of chastity, a perpetually incorporated member of a secular institute, unless a cleric, marries illicitly but validly.

5 — Canonical Hermits: Vows or Other Sacred Bonds

The history of eremitical life in the Church is long; the history of canonical hermits as described in canon 603 of the 1983 code is short. There was no parallel canon in the 1917 code. However, there was growing interest in

⁶⁶ *Comm*, 9 (1977), 365. “Suggestum est ut impedimentum extendatur omnibus qui sacra ligamina per professionem perpetuam contraxerunt; consecratio enim religiosa haberi potest per varia ligamina et non tantum per tria vota.”

⁶⁷ *Ibid.* “Aliquis Episcopus proposuit ut addatur in canone: ‘... votum publicum perpetuum castitatis in Instituto vitae consecratae emisit.’ Propositio omnibus placet.”

⁶⁸ PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW (= PCRCCL), *Relatio complectens synthesim animadversionum ab Em.iss atque Exc.iss Patribus Commissionis ad novissimum schema Codicis Iuris Canonici exhibitarum, cum responsionibus a Secretaria et Consultoribus datis*, in *Comm*, 15 (1983), 230. “Melius dicatur ‘... in Instituto religioso adstricti sunt’ ut clare pateat Instituta saecularia non comprehendi sub canone (unus pater). R. Admittitur.”

the revival of eremiticism during the twentieth century. Some council fathers at Vatican II called for church recognition of this solitary way of life both for professed religious and for individuals who were not members of institutes. A Canadian bishop made a passionate plea for official recognition of hermits.

Not a word is said about Hermits in the Code of Canon Law. One is left with the impression that they are excluded from the category of Christians recognized by the Code as Religious ... The Latin Church, however, is experiencing an ever-growing renewal of the life of hermits. It is urgent therefore that the Western Church officially recognize the life of hermits as a state of perfection. And Vatican Council II should make a point of this ... And the normal consequence of this approval in principle should be the establishment of appropriate canonical legislation.⁶⁹

Despite such interventions at the council, the documents of Vatican II do not call explicitly for canonical recognition of hermits. *Lumen gentium* recognizes the gift of the various forms of consecrated life "lived in solitude or in community,"⁷⁰ but it says nothing more about those who live in solitude. *Perfectae caritatis* briefly mentions the first men and women who dedicated their lives to God, including hermits and founders of religious families, but directs its norms specifically to religious and secular institutes and societies of apostolic life.⁷¹

During the code revision process, the *Coetus de Institutis perfectionis* decided in its first session that eremitical life would be recognized in the canons on consecrated life.⁷² Canon 92 §2 of the 1977 "Schema of Canons on Institutes of Life Consecrated by Profession of the Evangelical Counsels" provided for hermits who were members of religious institutes and those who were not,⁷³ but the *coetus* eventually decided that religious institutes that wished to do so could provide for the eremitical life of their members through

⁶⁹ Remi DE ROO, *Acta Synodalia*, vol. III, pars 7, 608-609. The text is also in Eutimio Sastre SANTOS, "La vida eremitica diocesana forma de vida consagrada, Variaciones sobre el canon 603," in *CpR*, 70 (1989), 137-138.

⁷⁰ *LG* 43. "Quo factum est ut, quasi in arbore ex germine divinitus dato mirabiliter et multiplicer in agro Domini ramificata, variae formae vitae solitariae vel communis ... tum ad bonum totius Corporis Christi opes augent."

⁷¹ *Perfectae caritatis* 1. "... vel vitam solitariam degerunt vel familias religiosas suscitaverunt."

⁷² *Comm*, 15 (1984), 197.

⁷³ PCRCL, *Schema canonum de Institutis vitae consecratae per professionem consiliorum evangelicorum*, Vatican City, Typis Polyglottis Vaticanis, 1977, c. 92 §2: "... sub ductu Ordinarii loci aut competentis moderatoris religiosi habeat et servet." English translation from *Schema of Canons on Institutes of Life Consecrated by Profession of the Evangelical Counsels*, Washington, D.C., United States Catholic Conference, 1977, 57 (= 1977 *Schema*).

their constitutions.⁷⁴ Thus canon 603 of the 1983 code describes what are called canonical or diocesan hermits. The first paragraph establishes three traditional characteristics of the eremitic or anchoritic life: stricter withdrawal from the world, the silence of solitude, and assiduous prayer and penance.⁷⁵ The second paragraph identifies legal requirements. “A hermit is recognized by law as one dedicated to God in consecrated life if he or she publicly professes in the hands of the diocesan bishop the three evangelical counsels, confirmed by vow or other sacred bond, and observes a proper program of living under his direction.”⁷⁶ The canon does not say explicitly that the vows of a canonical hermit are public as understood in canon 1192 §1; however it calls the profession “public.” It would seem incongruous to characterize vows made in the hands of the diocesan bishop in a public profession as private.⁷⁷ Helen MacDonald disagrees: “The vows or promises made by the hermit must be made in public but they are not, technically speaking, public vows (c. 1192).”⁷⁸

Eremitical profession by other sacred bonds includes, for example, the possibility of an oath, promise, or contract. The code does not express a preference for any particular form of *sacra ligamina*, vows or otherwise. Nonetheless, diocesan statutes on the eremitical life sometimes give preference to vows rather than other sacred bonds.⁷⁹ On the other hand, “Statues for the Hermits of

⁷⁴ PCRCL, *Relatio*, in *Comm*, 15 (1983), 6. “Hoc nullo modo significat vitam eremiticam seu anachoreticam in Institutis negari, sed ipsa singulis in Constitutionibus ordinatur vel ordinanda est.”

⁷⁵ Canon 603 §1. “... arctiore a mundo secessu, solitudinis silentio, assidua prece et paenitentia.”

⁷⁶ Canon 603 §2. “Eremita, uti Deo deditus in vita consecrata, iure agnoscitur si tria evangelica consilia, vota vel alia sacro ligamina firmata, publice profiteatur in manu Episcopi diocesis et propriam vivendi rationem sub ductu eiusdem servet.”

⁷⁷ A sample of diocesan statutes for hermits published in *Commentarium pro Religiosis et Missionariis* refers to the vows as “public vows.” See Domingo J. ANDRÉS, “Estatutos diocesanos para los ermitaños de la Iglesia particular de ... comentario aplicativo al can. 603 del CIC (2),” in *CpR*, 67 (1986), 194 (statute 20), 215 (statute 100), 217 (statute 106). See also ROSE McDERMOTT, “Institutes of Consecrated Life and Societies of Apostolic Life,” footnote 253, in *CLSA Comm2*, 768: “While the term ‘public vows’ is used only in c. 607, §2, describing a religious institute, it would seem that vows made by a hermit in the hands of the diocesan bishop meet the description of c. 1192, §1.”

⁷⁸ Helen L. MACDONALD, “Hermits: The Juridical Implications of Canon 603,” *StC*, 26 (1992), 171 (= MACDONALD, “Hermits”). The evangelical counsels “are generally assumed in the form of private vows.”

⁷⁹ According to ANDRÉS, most hermits profess the counsels by public vows; bonds other than vows are made “*excepcionalmente*.” See ANDRÉS, “Estatutos diocesanos para los ermitaños,” 194, 241. The “Rite of Profession of the Evangelical Counsels for a Person Following the Eremitic Way of Life” of the Diocese of La Crosse, Wisconsin, refers to profession and

France” recommend that a hermit choose promises rather than vows “if the obligation proper to a vow risks becoming a problem of scruples.”⁸⁰

Eremitical profession effects consecration as it is understood in canon 573 §1. The object of the evangelical counsels is defined in universal law (cc. 599-601), and the individual hermit’s rule of life approved by the diocesan bishop. Other juridical effects of the profession, including obligations and rights, must also be found in the rule of life or other agreements between the hermit and the bishop. While the canons do not include norms for dispensation of vows or other sacred bonds of a diocesan hermit, canonists generally recognize that the diocesan bishop is competent to dispense.⁸¹ Profession as a hermit, even by public vow, does not give rise to a diriment impediment to marriage.

6 — Societies of Apostolic Life: Some Bond Defined in the Constitutions

The 1917 code contained six canons on what were then called “societies of men or of women living in common without vows.” These societies were described as much by what they were not as by what they were. “A society, whether of men or of women, in which the members live in common imitating a religious rule under the government of a Superior according to an approved constitution, yet not obligated by the three usual public vows, is not properly religious, nor are its members properly designated by the term religious.”⁸² Although clearly not religious, a number of the canons on

acceptance of “vows,” and the two sample profession formulas use the term “vow.” See Marlene WEISENBECK, *Guide Book for the Vocation to Eremitic Life*, LaCrosse, WI, Diocese of La Crosse Office of Consecrated Life, 1997, 45, 50, 51, 54, 55.

⁸⁰ “Statutes for Hermits of France,” 5.1, unofficial translation in WEISENBECK, *Guide Book for the Vocation to Eremitic Life*, 6.

⁸¹ Ibid. See also, Sean O. SHERIDAN, “Consecrated Virgins and Hermits,” in *Jur*, 73 (2013), 507. “It would seem appropriate for the diocesan bishop to exercise the same oversight for a canonical hermit living in his diocese as with a diocesan right religious institute or society of apostolic life. Thus, the diocesan bishop could, for a grave reason, dispense the canonical hermit from his or her vows or even dismiss the canonical hermit who commits a grave delict.” See also MACDONALD, “Hermits,” 181-182.

⁸² *CIC* 1917, c. 673 §1. “Societas sive virorum sive mulierum, in qua sodales vivendi rationem religiosorum imitantur in communi degentes sub regimini Superiorum secundum probatas constitutiones, sed tribus consuetis votis publicis non obstringuntur, non est proprie religio, nec eius sodales nomine religiosorum proprie designantur.” English translation in Edward N. PETERS, *The 1917 Pio-Benedictine Code of Canon Law*, San Francisco, Ignatius Press, 2001, 256.

religious institutes were applied to these societies, but not the canons on profession. The 1917 code made no reference to the possibility of members assuming the evangelical counsels. Nonetheless, members of some of these societies undertook the counsels in some manner, but not by public vow.

Some societies indeed have vows, but these are of a private nature, and have only an ethical import; and of these some take only one or the other of the three usual vows, while others take all three vows of poverty, chastity and obedience, e.g., the Missionaries of St. Vincent de Paul. In some Societies we find no vows, not even private ones, e.g., the Oratorians. In other Institutes we find an *oath* of obedience as with the White Fathers of the African Missions; in others we find a promise of stability, a promise to observe common life, or as with the Pious Society of the Missions the *promise* to observe poverty, chastity and obedience.⁸³

Canon 731 §1 of the 1983 code describes societies of apostolic life as resembling (*accedunt*) institutes of consecrated life. “Societies of apostolic life resemble institutes of consecrated life; their members, without religious vows, pursue the apostolic purpose proper to the society and, leading a life in common as brothers or sisters according to their proper manner of life, strive for the perfection of charity through the observance of the constitutions.”⁸⁴ Canon 731 §2 recognizes that, in some of these societies, “members assume the evangelical counsels by some bond defined in the constitutions.”⁸⁵

According to Hubert Socha, the essential characteristics of a society of apostolic life are contained in the first paragraph of canon 731: 1) an apostolic end; 2) fraternal life in community and 3) striving for the perfection of charity.⁸⁶ Assuming the evangelical counsels is not an essential element, and members of societies that do not have this requirement nonetheless choose to follow Jesus unconditionally and commit themselves fully and for life.⁸⁷

⁸³ Matthew RAMSTEIN, *A Manual of Canon Law*, Hoboken, NJ, Terminal Printing & Publishing Co., 1947, 392.

⁸⁴ Canon 731 §1. “Institutis vitae consecratae accedunt societates vitae apostolicae, quarum sodales, sine votis religiosis, finem apostolicum societatis proprium prosequantur et, vitam fraternam in communi ducentes, secundum propriam vitae rationem, per observantiam constitutionum ad perfectionem caritatis tendunt.”

⁸⁵ Canon 731 §2. “Inter has sunt societates in quibus sodales, aliquo vinculo constitutionibus definito, consilia evangelica assumunt.”

⁸⁶ Hubert SOCHA, “La natura fondamentale e le caratteristiche di una Società di vita apostolica (= sva) con particolare riferimento ai suoi tre tipi,” *CpR*, 80 (1999), 36 (=SOCHA, “La natura fondamentale”).

⁸⁷ *Ibid.*, 47. According to Socha, societies that do not assume the evangelical counsels include the Confederation of the Oratory of St. Philip Neri, Society of Priests of St. Sulpice, Congregation of Jesus and Mary (Eudists), St. Josephs’ Missionary Society of Mill Hill, and the Society of African Missions. Societies that assume the evangelical counsels include

Incorporation into a society of apostolic life can occur through assumption of the bond in some societies. Otherwise, incorporation is by grant of admission, a declaration, a promise to the society, a promise to the society by oath, a promise of obedience to the society, or permission to make vows.⁸⁸

Three questions arise concerning societies in which the counsels are assumed by some bond. (1) *Does assumption of the bond constitute a profession?* Canon 731 §2 does not use the term “profession” in relation to societies of apostolic life; rather, the evangelical counsels are “assumed.” The canons specific to secular institutes also refer to assumption of the counsels rather than profession (cc. 712, 723 §1, 724 §1). However, canon 573 §2, which applies to religious and secular institutes, refers to profession. According to Jean Bonfils, the evangelical counsels in a society of apostolic life are not professed. “They are *assumed* not *professed* since a profession, etymologically and canonically, constitutes a public act. Those other kinds of vows or bonds (oaths, promises, etc.), however, are private, not public, according to the definitions given to them by c. 1192 §1, and they do not incorporate one into the society.”⁸⁹ Others would say that the bonds, even if not “professed” and not public in the sense of c. 1192 §1, have a public-ness about them. According to Socha, whether private or public, they must be “provable” in the external forum.⁹⁰ Furthermore, the universal law on the evangelical counsels (cc. 598-601) are extended to societies by canon 732. Finally, the constitutions of societies, like those of religious and secular institutes, are approved by ecclesiastical authority (cc. 732 and 587 §2). Therefore, the manner of assuming the counsels and the object of the counsels as defined in the constitutions are regulated by and approved by the Church. The debate over the public nature of the bonds in a society of apostolic life is not unlike the debate over the public nature of bonds in a secular institute.

2) *Are the bonds in a society of apostolic life “sacred”?* Canon 119 of the 1977 *Schema of Canons of Life Consecrated by Profession of the Evangelical Counsels* referred to these bonds as *sacra vincula*, but the adjective was later dropped.⁹¹ When the *coetus* voted in May 1980 on whether to include *sacrum*, four consultors voted in favor, but the rest abstained, noting

St. Vincent de Paul’s Congregation of the Mission, Society of the Catholic Apostolate (Pallotines), Society of the Missionaries of Africa (White Fathers), and the Yarumal Society for the Foreign Missions. SOCHA, “La natura fondamentale,” 47-49.

⁸⁸ SOCHA, “La natura fondamentale,” 43-44.

⁸⁹ Jean BONFILS, “Societies of Apostolic Life,” in *Exegetical Comm*, 2/1, 1978 (= BONFILS, “Societies”).

⁹⁰ SOCHA, “La natura fondamentale,” 46.

⁹¹ 1977 *Schema*, c. 119: “... consilia evangelica aliquo sacro vinculo firmata assumunt.”

that the secretary had explained that it was not necessary, that “it goes without saying.”⁹² Nonetheless, according to Bonfils, it is significant that the descriptor “sacred” is not used in relation to the bonds in societies of apostolic life.

Thus this bond cannot be considered a sacred bond in the sense given to that expression by c. 573, since it is the act of profession, from the canonical point of view, that gives the bond its sacred character. We think that besides c. 731 §2, in which the legislator avoids the expression “sacred bond,” there are other canons (643 §1, 3° and 721 §1, 2°) that differentiate between the sacred bond proper to the ICLs—which require the practice of the evangelical counsels and cause incorporation into the institute—and the incorporation into an SAL.⁹³

3) *What form does the bond take?* The canons give no specification regarding the nature of the bond by which the counsels are assumed in a society of apostolic life. Historically, and in current constitutions, there are a number of forms that the bond takes, just as in secular institutes. For example, it can be a private vow, a promise, an oath, or a contract. In addition to the obligations attached to each of the evangelical counsels in universal law, the constitutions must spell out other obligations.

As with sacred bonds in secular institutes, assumption of the evangelical counsel of chastity in a society of apostolic life does not constitute a diriment impediment to marriage. Unlike religious and secular institutes, an indult of departure from a society of apostolic life, with cessation of the obligations and rights, can be granted by the supreme moderator “unless it is reserved to the Holy See according to the constitutions.”⁹⁴

Conclusion

For centuries, the only form of life consecrated by profession of the evangelical counsels that was recognized by the Church was religious life and, as

⁹² *Comm*, 13 (1981), 389: “Gli altri Consultori si astengono perché, come spiega Mons. Segretario, non è necessaria l’aggiunta: ciò va da sé.”

⁹³ BONFILS, “Societies,” 1978. According to Sharon Holland, vows or bonds that are “sacred” bind under the virtue of religion, and the fact that the bond in a society of apostolic life is not described as sacred indicates “the fundamental distinction between societies and institutes of consecrated life as described in canon 573.” Sharon HOLLAND, “New Societies for a New World,” in *Jur*, 67 (2007), 237.

⁹⁴ Canon 743. “Indultum discedendi a societate ... a supremo Moderatore ... nisi id iuxta constitutiones Sanctae Sedi reservetur.”

long as that was the case, there was no need to speak of profession by any means other than public vows. When, in 1947, Pope Pius XII recognized secular institutes as a form of consecrated life, he provided for other forms of professing the counsels to distinguish these new institutes from religious institutes. Thus, there arose a need for new terminology that embraced both public vows and these other forms. *Lumen gentium* introduced the term *sacra ligamina*—"sacred bonds." The 1983 Code of Canon Law also uses *sacra ligamina* as an inclusive term, but refers to the *sacra ligamina* within secular institutes more specifically as *sacra vincula*.

Theologically and canonically, the public vows of religious, the sacred bonds of secular institutes, and the vows or sacred bonds of canonical hermits effect consecration as it is described in canon 573 §1. Societies of apostolic life, even those that require assumption of the counsels by a bond defined in the constitutions, are not recognized canonically as a form of consecrated life. The public vows of religious institutes, the sacred bonds of secular institutes, and the vows or sacred bonds of hermits are also distinguished from bonds of societies of apostolic life in that they require intervention by ecclesiastical authority in order to be dispensed.

The public vows of religious have at least one juridical effect that distinguishes them from all other forms of bonds: the perpetual public vow of chastity in a religious institute constitutes a diriment impediment to marriage. Furthermore, a religious who attempts marriage without a dispensation from vows may incur a *latae sententiae* interdict. This indicates that public religious vows have a more binding nature than the bonds of secular institutes, societies, and hermits, even if hermits are able to profess the counsels by public vows, as seems to be the case.

There is a long history of public vows of religious that gives them a canonical clarity that has not yet developed regarding other forms of sacred bonds. In particular, there is lack of clarity regarding the nature of vows available to members of secular institutes. Pope Pius XII explicitly rejected the possibility of members of these institutes making "public religious vows," but these vows cannot simply be described as private. It is problematic that public vows have come to be equated with religious vows. There is nothing in the canons on vows that limits public vows to members of religious institutes. Historically, it may have been necessary to differentiate secular institutes from religious institutes by prescribing something other than public vows for them. However, as the distinct nature of secular institutes becomes more clearly understood, there is no reason to continue to limit their vows to some ambiguous form that is neither public nor private.

While there is greater clarity regarding the public vows of religious and juridically they are somewhat more binding than other forms of sacred bonds, it cannot be said that they are “better” than other forms. The best form of bond by which the evangelical counsels are undertaken is that which corresponds to the particular vocation of each individual who is called to consecrated life or to a society of apostolic life. Those who profess or assume the evangelical counsels by any means dedicate themselves wholly to God and the Church and, indeed, to all humankind.

THE *APPELLATIO MERE DILATORIA* IN CAUSES OF NULLITY OF MARRIAGE. A CONTRIBUTION TO THE GENERAL THEORY OF THE APPEAL AGAINST A DEFINITIVE SENTENCE

WILLIAM L. DANIEL*

SUMMARY — One of the novelties introduced in Pope Francis' 2015 reform of the marriage nullity process is the legislative classification of some appeals against a definitive sentence as "merely dilatory." Given judicial experience, many commentators and practitioners initially took the expression "merely dilatory appeal" to mean an appeal that is made by the appellant with the intent to cause delays in the cause. When an appeal is made as a delay tactic, therefore, the new law would seem to allow the appellate judge simply to confirm the decision immediately. This view, however, is seen to be overly simplistic, since it may frequently happen that a delay-motivated appeal is made against an otherwise unjust sentence, whose injustice in reality should impede its simple confirmation. The author accordingly demonstrates that, apart from the motives of the appellant, an appeal is merely dilatory when it would certainly cause a delay in the execution of a clearly just definitive sentence. This discussion is situated within an investigation of the foundational elements of the institute of the appeal, namely, its nature, the notion of a grievance (*gravamen*), and the motives of an appeal. An examination of the institute of the rejection of an appeal is also made (cf. *CIC* c. 1631), given the seeming resemblance between the immediate confirmation of an appealed sentence prior to an appellate process and the rejection of an appeal *in limine*.

RÉSUMÉ — L'une des nouveautés introduites en 2015, par le pape François dans sa réforme sur le processus de nullité du mariage, est la classification législative de certains appels contre une sentence définitive comme « simplement dilatoire ». Compte tenu de l'expérience judiciaire, de nombreux commentateurs et praticiens ont d'abord utilisé l'expression « appel simplement dilatoire » pour

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signifier un appel déposé par l'appelant dans l'intention de retarder la cause. Lorsqu'un appel est appliqué comme une tactique de retard, la nouvelle loi semble par conséquent permettre au juge d'appel simplement de confirmer la décision immédiatement. Cependant, ce point de vue, est considéré comme trop simpliste, car un appel de retard motivé peut être, par ailleurs, déposé contre une sentence injuste, dont l'injustice dans la réalité devrait entraver la simple confirmation. L'auteur démontre donc, qu'à part les motifs de l'appelant, un appel est simplement dilatoire quand il aurait certainement causé un retard dans l'exécution d'une sentence claire que définitive. Cette discussion se situe dans une enquête sur les éléments fondamentaux de l'institut de l'appel, à savoir sa nature, la notion d'un grief (*gravamen*) et les motifs de l'appel. Un examen de l'institut du rejet d'un appel est également fait (cf. CIC c. 1631), compte tenu de la ressemblance apparente entre la confirmation immédiate d'une peine en appel avant une procédure d'appel et le rejet d'un pourvoi *in limine*.

Introduction

There seems to be general agreement that the qualitatively most profound modification enacted by Pope Francis in his reform of the canons governing the marriage nullity process¹ is the derogation of the requirement of a double conformity of sentences declaring the nullity of marriage before the spouses are considered free to enter a subsequent marriage. For that derogation eliminated a 274-year legislative safeguard of the dignity and stability of marriage and the family established by his predecessor of happy memory Pope Benedict XIV. While it was the most profound change, it was not unanticipated; for it had been debated among authors for over a decade, and it was being suggested on the occasion of the third extraordinary assembly of the synod of bishops celebrated at the Vatican in October 2014.

Rather, as one author recognizes, “one of the most surprising”² rules concerns the new regulation of the appeal against the definitive sentence declaring

¹ FRANCIS, motu proprio *Mitis iudex Dominus Iesus*, 15 August 2015, Vatican City, Libreria Editrice Vaticana, 2015; IDEM, motu proprio *Mitis et misericors Iesus*, 15 August 2015, Vatican City, Libreria Editrice Vaticana, 2015.

Throughout this article, the canons as revised by these two motu proprios will be cited simply as canons of the *CIC* and *CCEO*, instead of *MIDI* and *MMI*; and the norms of the *Ratio procedendi* attached to both documents shall be cited as *RP*. Any citation of the derogated canons will be made clear.

² See Geraldina BONI, “La recente riforma del processo di nullità matrimoniale. Problemi, criticità, dubbi (parte seconda),” in *Stato, Chiese e pluralismo confessionale. Revista telematica* (www.statoechiese.it) (2016-10), 58. About the new regime on appeals, she concludes: “Una babele di quesiti si schiude davanti agli interpreti” (*ibid.*, 64).

the nullity of marriage, especially as regards the possibility of there being an appeal classified as “merely dilatory” (*appellatio mere dilatoria*). For, notwithstanding the elimination of the higher level examination of a declaration of nullity required by law, the sanctity of marriage would still enjoy the possibility for equivalent protection thanks to the institute of the appeal. That is, a party to the marriage or the defender of the bond who found such a declaration to be unjust could still at least call upon the authority of a superior tribunal, receive a new hearing, and hope for a just decision reforming the prior one. The fact, however, that an appeal could be curtailed or even “rejected” (cf. *CIC* cc. 1680 §2, 1687 §4) after being considered “merely dilatory” could give the impression that one could actually be deprived of the right to appeal—a right so basic in most areas of government at all levels when a decision touches upon one’s personal interests, even those of much less importance than one’s status in the Church and before Almighty God.

Because of the seriousness of this matter and the novelty of its legislative formulation, it is the worthy object of scientific examination. This study thus aspires to offer a proposal about the meaning of this new expression in ecclesiastical legislation. It situates the discussion in the broader context of the nature of the appeal, as a general institute of the judicial system of the Church. Then, considering that it seemingly concerns a judgment *in limine* about the admission of the appeal to trial, the current discipline on that distinct matter is examined. Finally, since the whole reform and each of its parts are best understood through the lens of and examined in relation to canonical tradition (cf. *CIC* c. 6 §2), there is an investigation about any precedents for the “merely dilatory appeal” in the history of the Church’s sacred discipline.

This discussion is limited to the appeal against the definitive sentence, to the exclusion of the *ius appellandi* against other acts of judicial power, especially those having the force of a definitive sentence, and all that is included in the *ius recurrendi* within the judicial process. These questions are the object of no little attention in jurisprudence and doctrine, but they are tangential to our chief aim of understanding the purest form of appeal, namely, the challenge of the merits of the definitive sentence. They will therefore have to be taken up elsewhere.

1 — *The Nature of the Appeal*

A general discussion on the nature of the appeal gives rise to several technical elements, each interrelated while also meriting their own

concentrated attention. After first examining the institute of the appeal in broad terms and with some procedural explanations, two particular questions will be treated. The first concerns the notion of the *gravamen*, or grievance, that is the basis for the appeal, which is given its own treatment in order to attend to some disputed questions. The second concerns the motives for the appeal, bearing in mind the impression of several authors to be described below that the dilatory character of an appeal is a matter of the dilatory *motives* for the appeal.

1.1 — The Institute of the Appeal

An appeal—“*appellatio*”—is a juridical act by which a party to litigation finding himself aggrieved by the definitive sentence seeks its emendation from the superior judge.³ This particular juridical act is not a mere request for something not yet in one’s possession, like a petition for a favor or even a recourse against a singular administrative decree. It is much more significant inasmuch as, when it is legitimately placed, it is highly efficacious in the context of the trial. In relation to the definitive sentence causing the grievance, it has *suspensive* effect (cf. *CIC* c. 1638, *CCEO* c. 1319), which is to say that the valid authoritative judicial resolution to the controversy issued in virtue of public judicial power cannot be validly executed.⁴ While valid and intrinsically effective as a juridical act, the appealed definitive sentence is practically ineffective, at least temporarily. In relation to the judges involved, it is said to be *devolutive* inasmuch as it establishes obligations for the judges. On the part of the judge *a quo*, it creates an obligation to transmit the cause to the superior judge to whom it has been directed (cf. *CIC* c. 1634 §3, *CCEO* c. 1315 §2).⁵ On the part of the judge *ad quem*,

³ “Appellatio sive provocatio est ad maiorem iudicem contra sententiam facta vocatio et proclamatio” (*Die Summa des “Paucapalea” über das “Decretum Gratiani,”* Johann Friedrich von Schulte (ed.), Giessen, Verlag, 1890, 61 *sub* “Qu. VI”). Cf. *CIC* cc. 1628, 1634 §1; *CCEO* cc. 1309, 1315; 1917 *CIC* cc. 1879, 1884 §1; SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Decree of the Prefect in *Congresso, Nullitatis matrimonii; De appellatione contra expensas*, 17 November 1970, in *Per*, 60 (1971), 303, no. I, 1 (= APOSTOLIC SIGNATURA, Decree, 17 November 1970); PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, Instruction *Dignitas connubii*, 25 January 2005, Vatican City, Libreria Editrice Vaticana, 2005, at artt. 279 §1, 285 §1 (= DC).

⁴ Cf. Interlocutory Sentence *c. PINTO, Parisien., Iurium; Nullitatis sententiae*, 8 May 1998, in *RRT Dec*, 90 (1998), 369-374.

⁵ This is distinct from administrative activity, in which one approaches the author of a decree causing a grievance, requesting that he revoke it (*remonstratio* – *CIC* c. 1734 §§1-2). When the public ecclesiastical administration issues a binding disposition in a matter within its competence, it retains its competence over the matter, given its institutional bond with the

it gives rise to a duty to receive and handle the cause at the next level of jurisdiction (cf. *CIC* cc. 1457 §1, 1640; *CCEO* cc. 1115 §1, 1321). The appeal, then, is not only a means for challenging definitive sentences but also a certain limitation on the authority of the judge.

What is the juridical origin of the institute of the appeal? The remedy of appeal, while not as such prescribed by the natural law, flows from natural justice and from equity, even if its various aspects are governed by the positive law. On the one hand, given the potential limitations of any human judgment, it is necessary to recognize a natural faculty to have some recourse against a decision touching upon one's juridical situation, generically speaking. On the other hand, the specific right to challenge a judicial decision before a superior judge is granted to varying degrees and governed by the positive law. In this regard, we read: "Although the right of self-defense should not give occasion to the infinite protraction of litigation and the wearying of opponents, nevertheless since the appeal is as regards its substance founded in the natural law, it follows that one upon whom a grievance has been inflicted in a trial can appeal."⁶

The institute of the appeal presupposes *the principle of the double level of jurisdiction (principium duplicis gradus iurisdictionis)*, that is, the general rule of justice according to which a single judicial decision is subject to hierarchical jurisdictional control. "[E]ven in canon law, this principle

public good in general (cf. *CIC* cc. 47, 136, 139). The exercise of judicial power, however, depends upon the existence of a controversy introduced before the judge by a party (cf. *CIC* cc. 1501 and 1620, 4^o); the jurisdiction of the judge therefore, as a rule, ends with the issuance of the definitive sentence (*CIC* c. 1517, *DC* art. 259).

⁶ Definitive Sentence *c. QUATTROCOLO, Nullitatis matrimonii*, Decisio XXVII, 26 April 1939, in *RRT Decr.*, 31 (1939), 244, no. 4 (= Definitive Sentence *c. Quattrocolo*, 26 April 1939): "Quamvis ius sese defendendi ansam praebere non debeat ad lites in infinitum protrahendas et ad adversarios defatigandos, cum verumtamen appellatio quoad sui substantiam in iure naturali fundetur, sequitur omnes appellare posse quibus in iudicio gravamen illatum est." See also Decree *c. FALTIN, Olomucen., Nullitatis matrimonii; Novae causae propositionis*, 16 January 1990, in *RRT Decr.*, 8 (1990), 19, no. 21 c): "Quod ius appellationis sacrosantum manet facitque partem iuris defensionis vi iuris naturalis (...)."

Cf. Franz SCHMALZGRUEBER, *Jus ecclesiasticum universum brevi methodo ad discentium utilitatem explicatum seu lucubrationes canonicae in quinque libros Decretalium Gregorii IX Pontificis Maximi*, vol. 2-2, Rome, Typographia Rev. Cam. Apostolicae, 1844, 473 sub I. 6 (= SCHMALZGRUEBER, *Jus ecclesiasticum universum*); Michele LEGA, *Praelectiones in textum iuris canonici de iudiciis ecclesiasticis in scholis Pont. Sem. Rom. Habitaе*, vol. 1, Rome, Typis Vaticanis, 1896, 602, no. 620 sub 1) (= LEGA, *Praelectiones*); Francesco ROBERTI, *De processibus*, vol. 2, Rome, Athenaeum Pontificii Seminarii Romani ad S. Apollinaris, 1926, 197, no. 467 (= ROBERTI, *De processibus*); A. AMANIEU, "1. Appel," in R. NAZ (ed.), *Dictionnaire de droit canonique*, vol. 1, Paris, Librairie Letouzey et Ané, 1935, 766.

is one of the fundamental principles of the procedural system.”⁷ From a structural perspective, this principle maintains that, in contentious matters regulated by the formality of the judicial order (*ordo iudiciarius*), there is necessarily a judicial organization marked by a certain hierarchy of jurisdictional organs, or tribunals.⁸ From the dispositive perspective, this principle recognizes that a single definitive judgment, at least upon issuance, is intrinsically susceptible to reformation; it may become a *res iudicata* only according to the prescriptions of law, that is, classically, after the passage of a certain period of time stipulated in law for lodging a challenge coupled with the inaction of the parties. From the perspective of justice, this principle accords the parties to litigation the right to challenge a single definitive judgment in order to obtain a new examination of the cause and a second authoritative judgment.

The ecclesiastical legislator has established the institute of appeal for the canonical order as a means for promoting a just social order and, in particular, so that the Church’s judiciary may be a more effective instrument for the discovery of the truth in the causes introduced within it. In other words, the Church aspires for the correspondence between the real or ontological truth and the “procedural truth” resulting from a judicial investigation. This is important in any judiciary but especially in the Church’s, since the majority of causes pertain to the status of persons and the relationship of the faithful to the sacred goods of the Church and thus to the good of souls.⁹ According to classic principles, the appeal, as an instrument that strives to bring the *favor veritatis* to realization, has a threefold purpose: “1° so that the grievance unjustly inflicted on those oppressed may be removed (...); 2° so that the injustice or inexperience of the judges may be corrected (...); 3° so that the defects in proof

⁷ See Fernando DELLA ROCCA, *Istituzioni di diritto processuale canonico*, Turin, Editrice Torinese, 1946, 324, no. 156 (= DELLA ROCCA, *Istituzioni*). This right is frequently treated in the writings of Joaquín LLOBELL (see, e.g., *I processi matrimoniali nella Chiesa*, Subsidia Canonica 17, Rome, EDUSC, 2015, 259, at 7.7.2.).

⁸ Cf. Decree c. FERREIRA PENA, *Bogoten., Nullitatis matrimonii; Nullitatis sententiae*, 15 April 2005, in *RRT Decr.*, 23 (2005), 14, no. 2.

⁹ Cf. Fernando DELLA ROCCA, *Appunti sul processo canonico*, Milan, Giuffrè Editore, 1960, 139-140 (= DELLA ROCCA, *Appunti sul processo canonico*); Carlo GULLO and Alessia GULLO, *Prassi processuale nelle cause canoniche di nullità del matrimonio. Terza edizione aggiornata con l’Instr. “Dignitas connubii” del 25 gennaio 2005*, Studi Giuridici 80, Vatican City, Libreria Editrice Vaticana, 2009, 284, no. 3 (= GULLO-GULLO, *Prassi processuale*); Nikolaus SCHÖCH, “Impugnación de la sentencia,” in Javier OTADUY et al. (ed.), *Diccionario General de Derecho Canónico*, vol. 4, Pamplona, Thomson Reuters Aranzadi, 2012, 453 (book hereafter *DGDC*).

admitted in the first judgment out of ignorance or negligence may be amended in second instance.”¹⁰

How is it that one appeals against a definitive sentence? This question implies several elements: awareness of the definitive sentence, an evolution of the procedural relationship between the aggrieved party and the judge, and the establishment of a new procedural relationship between the aggrieved party and the superior judge. In other words, the institute of the appeal depends upon 1) the publication of the definitive sentence, as well as 2) the introduction and 3) prosecution of the appeal.¹¹

1. Exercising the right of appeal presupposes the proper publication of the definitive sentence, namely, the manual handing over or very safe transmission of an integral copy of the text of the definitive sentence (cf. *CIC* cc. 1615, 1634, 1687 §2; *CCEO* cc. 1298, 1373 §2). Indeed, apart from the immediate substantive purpose of offering the parties a complete explanation in response to the stated terms of the controversy, the procedural purpose for the publication of the definitive sentence is to offer them a practical opportunity to exercise the right of appeal.¹² This was declared by Pope St. John Paul II in his celebrated 1989 discourse to the Roman Rota on the principle of the right of defense.

It cannot cause surprise to speak also, in relation to the right of defense, of the necessity of the publication of the sentence. In fact, how could one of the parties defend himself at the level of appeal against the sentence of the inferior tribunal if he had been deprived of the right to come to know its

¹⁰ See Definitive Sentence *c.* QUATTROCOLO, 26 April 1939: 244, no. 4: “Certum est quod institutum appellationis est remedium ordinarium ad revocationem vel ad rescissionem sententiae obtinendam; nam parti laesae per iudicis sententiam datur facultas intra tempus a iure statutum provocandi ad iudicem superiorem, triplici quidem ex capite, nempe: 1° ut gravamen oppressis inique illatum removeatur (cap. 15, tit. 28, lib. II); 2° ut iniquitas et imperitia iudicantium corrigatur (Ulpianus, in prol. tit. 1, ff. *De appel.*); 3° ut defectus in probando, ex ignorantia vel negligentia admissi in primo iudicio, in secunda instantia emendentur (cap. 4, tit. 28, lib. II).” Cf. Roberti, *De processibus*, 2: 197, no. 467; Thomas Arthur CONNOLLY, *Appeals. An Historical Synopsis and Commentary*, Canon Law Studies no. 79, Washington, D.C., The Catholic University of America, 1932, 2 (= CONNOLLY, *Appeals*); Anton MORHARD, *L'appello nel diritto processuale canonico*, Rome, Pontificia Universitas Lateranensis, 1994, 20 (= MORHARD, *L'appello nel diritto processuale canonico*); Miguel LÓPEZ DÁVALOS, “La apelación contra la sentencia,” in *RMDC*, 18 (2012), 76-77 and 84.

¹¹ Cf. Interlocutory Sentence *c.* FUNGHINI, *Ruremunden.*, *Nullitatis sententiae*, 29 November 1990, in *RRT Dec.*, 83 (1990), 830, no. 11.

¹² Cf. Decree *c.* FALTIN, *Bostonien.*, *Nullitatis matrimonii; Nullitatis decreti confirmatorii*, 12 June 1990, *RRT Dec.*, 8 (1990), 109, no. 7. On the relation between the publication of the sentence and the computation of the preceptory time limits for appealing, *vide infra* section 2.2 (at no. 3).

motivation both *in iure* and *in facto*? The code therefore demands that there be placed as a premise to the dispositive part of the sentence the reasons on which it is based. And this not only facilitates obedience to it whenever it has become executable but also guarantees the right of defense in an eventual further instance.¹³

Some tribunals have ingrained practices of quasi-publication of the sentence, seemingly adopted out of fears of civil litigation or causing offense or out of mistrust of the parties. Prescinding from the fact that these fears tend to be inflated, in the context of the present discussion it should be acknowledged that such practices at least reduce and at worst deny the full exercise of the parties' right to appeal the sentence. Moreover, those holding an office constituting them as public parties in a cause (*viz.*, the defender of the bond and the promoter of justice) have both a right to receive a copy of the definitive sentence (*DC* art. 258 §2) and a duty carefully to examine it in full so as to determine whether the correct exercise of their function demands that it be appealed.

2. During the course of the trial, the judge gives impulse to each stage and its developments. He decides particular questions, establishes time limits, initiates certain moments, and notifies the parties of developments and of the manner in which they may exercise their procedural rights. The parties make requests, and the judge replies by decree; the parties, witnesses and

¹³ For the whole teaching on the matter, see JOHN PAUL II, discourse to the Tribunal of the Roman Rota, 26 January 1989, in *AAS*, 81 (1989), 924-925, no. 7: "Non può destare meraviglia parlare anche, in rapporto al diritto di difesa, della necessità della pubblicazione della sentenza. Infatti, come potrebbe una delle parti difendersi in grado d'appello contro la sentenza del tribunale inferiore, se venisse privata del diritto di conoscerne la motivazione sia *in iure* che *in facto*? Il Codice esige quindi che alla parte dispositiva della sentenza siano premesse le ragioni sulle quali essa si regge, e ciò non soltanto per rendere più facile l'obbedienza ad essa, qualora sia diventata esecutiva, ma anche per garantire il diritto alla difesa in un'eventuale ulteriore istanza. Il canone 1614 dispone conseguentemente che la sentenza non ha alcuna efficacia prima della sua pubblicazione, anche se la parte dispositiva, permettendolo il giudice, fu resa nota alle parti. Non si capisce perciò come essa potrebbe venir confermata in grado d'appello senza la dovuta pubblicazione. Per garantire ancora di più il diritto alla difesa, è fatto l'obbligo al tribunale di indicare alle parti i modi secondo i quali la sentenza può essere impugnata. Sembra opportuno ricordare che il tribunale di prima istanza, nell'adempimento di questo compito, deve anche indicare la possibilità di adire la Rota Romana già per la seconda istanza. È doveroso inoltre, in questo contesto, tener presente che il termine per l'interposizione d'appello decorre soltanto dalla notizia della pubblicazione della sentenza, mentre il canone 1634, § 2, dispone: '*Quod si pars exemplar impugnae sententiae intra utile tempus a tribunali a quo obtinere nequeat, interim termini non decurrunt, et impedimentum significandum est iudici appellationis, qui iudicem a quo praecepto obstringat officio suo quam primum satisfaciendi.*'" For an English translation of the full discourse, see *CLD* 12: 867-871.

experts present themselves for examination, and the judge examines them and approves the act of their contribution to the proofs. Parties may make intraprocedural recourse to the college of judges against a particular decree of the judge, but this causes no alteration in the relationship between the party and the judge; for “the judge” in the trial may act singly or collegially, as the case may be, and the whole *res litigiosa* ordinarily remains ever under his jurisdiction. All of this describes the *procedural relationship* between the judge and the parties.

This relationship reaches its pinnacle when the judge hands down his authoritative pronouncement giving resolution to the doubts agreed upon and stated in the formulation of the doubt. That pronouncement, the definitive sentence, is the major act of the judge’s participation in the procedural dialectic, and in the ordinary course of the process it effectively concludes his procedural relationship with the parties and dissolves the judge’s jurisdiction over the *materia litis*.¹⁴ When one of the parties is aggrieved by that sentence, he has the ordinary right to make one final contribution to his procedural relationship with the judge: a proclamation of the will to challenge it. This is the introduction (*interpositio*) of the appeal, and it consists in the simple declaration of the will to appeal the sentence on the part of the aggrieved party before the judge that issued it (*a quo*).¹⁵ The appellant need not explain to the judge why he wishes to appeal the sentence, nor does the judge have a right to demand such an explanation. “It is sufficient for the appellant to indicate to the judge *a quo* that he is introducing an appeal” (*DC* art. 281 §2). Practically speaking, it would also be natural for the appellant to inform the judge about which competent appellate tribunal has been selected when there is more than one.¹⁶

¹⁴ While the judge may still correct merely material errors in the sentence or even declare the sentence null or, in some cases, grant a *restitutio in integrum* when the trial does not concern the status of persons, he may not revoke the decision as if it were an administrative act, on reasons of merit alone. Cf. *CIC* cc. 1616, 1624, 1646 §1; *CCEO* cc. 1299, 1305, 1327 §1; *DC* artt. 259, 260, 274 §1.

¹⁵ See della Rocca, *Istituzioni*, 336, no. 164; Gian Paolo MONTINI, “Capitolo II. L’appello,” in *Codice di diritto canonico commentato*, 3rd ed., Milan, Ancora Editrice, 2009, 1267, *sub* Canon 1630 (= MONTINI, “Capitolo II. L’appello”).

While this step is obligatory and guarantees the certitude of the judge *a quo* about the executability of the sentence, it is not foreign to judicial praxis for an appeal introduced directly to the Roman Rota within the peremptory time limit of 15 days to be admitted. Cf. *DC* art. 283 §3 (“Appellazione ad Rotam Romanam interposita ...); *Comm*, 39 (2007), 125, 160, *sub* “*Can. 1890*.”

¹⁶ Cf. Decree c. POMPEDDA, *Cerretana, Nullitatis matrimonii; Competentiae Romanae Rotae et confirmationis sententiae*, 14 December 1992, in *RRT Decr*, 10 (1992), 207-208, nn. 4-8 (= Decree c. POMPEDDA, 14 December 1992); Decree c. DEFILIPPI, *Lucen, Nullitatis matrimonii; Legitimitatis receptionis causae apud Rotam Romanam*, 5 April 1995, in *RRT Decr*, 13 (1995), 45, no. 3.

3. Once the procedural relationship between the judge *a quo* and the parties has been dissolved, and after the judge *a quo* has complied with his duty to transmit the acts of the cause to the chosen appellate tribunal, the appellant must initiate a procedural relationship with the appellate judge (judge *ad quem* or tribunal *ad quod*). This occurs by the act of the prosecution or pursuit (*prosecutio*) of the appeal. The prosecution of the appeal constitutes the moment when the appellant brings the grievance before the appellate tribunal, requesting its ministry of justice at the higher level of jurisdiction.¹⁷ This act serves to confirm before the appellate judge the act of introduction of the appeal, and it more precisely identifies the object of the appeal by the statement of motives and possibly the identification of which elements of the dispositive part of the sentence are being challenged.¹⁸ Attaching the definitive sentence to the appeal ensures that the appellate tribunal may immediately come to know the nature and basic history of the judicial controversy and make an immediate decision about the legitimacy of the appeal.¹⁹

1.2 — The Nature of the Grievance (*gravamen*)

The basis for the appeal is not merely the fact of being a party but being also a party *aggrieved* by the sentence. For the existence of a *gravamen* is what motivates one to challenge the sentence issued. One can be aggrieved, *sensu lato*, by a definitive sentence for a number of reasons: because there are clear material errors (e.g., an incorrect name of one of the parties), it does not give reply to all the *dubia* posed in the formulation of the doubts, it is based on manifestly false information, and so on. However, the grievance that gives basis for an appeal need not include all or any of these defects. Rather, it is a matter of having a subjective conviction that the merits of the decision conveyed in the sentence are unjust, or contrary to one's juridically protected rights being vindicated in the process.²⁰

¹⁷ The appellant may ask the judge *a quo* to transmit the act of prosecution to the judge *ad quem* (DC art. 284 §2). However, it is prudent for the appellant not to leave this matter entirely in the hands of the judge whose sentence is being challenged, lest through the negligence or malice of the latter the appeal remain untransmitted.

¹⁸ Cf. ROBERTI, *De processibus*, vol. 2, 211-216, nn. 478-479, at 216 (no. 3); Paolo MONETA, "L'appello," in Pier Antonio Bonnet and Carlo Gullo (eds.), *Il processo matrimoniale canonico*, 2nd ed., Studi Giuridici 29, Vatican City, Libreria Editrice Vaticana, 1994, 790 (= MONETA, "L'appello").

¹⁹ Cf. *Comm*, 39 (2007), 113.

²⁰ Cf. DELLA ROCCA, *Istituzioni*, 324, note 1. See also Manuel Jesús ARROBA CONDE, *Diritto processuale canonico*, 5th ed., Rome, Editiones Institutum Iuridicum Claretianum, 2006, 548

1.2.1 — *The Grievance in General*

The object of the grievance is not just any part of the sentence—such as a specific argument or representation of persons or facts—but precisely the dispositive part of the sentence, that is, what it ultimately decides as regards each *causa petendi* in response to the formulation of the doubt.²¹ “[B]y the expression ‘thinks himself aggrieved’ is understood a grievance only in the dispositive part, for the object of the appeal, and not in the other parts of the sentence.”²² For example, one may not appeal against a sentence favorable to himself only insofar as its evaluation of the proofs is offensive. The evaluation of proofs in the challenged sentence may in fact be offensive or even unjust in some respect. Nevertheless, the appellate judge has no ability to change the words or arguments used in the motivation of the sentence but only to confirm or reform its dispositive part. The proper immediate remedy against such a concern is a request for the judge *a quo* to amend the text of the sentence; though in a more serious case, one could even propose a new cause of rights or a penal cause—for example, in order to vindicate one’s right to a good name.²³ On the other hand, the object of the appeal need not include the entire dispositive part of the sentence but may perhaps be limited to only one or more of its several dispositions (e.g., *capita nullitatis*), as the case may be.²⁴

(= ARROBA CONDE, *Diritto processuale canonico*); Francesco PAPPADIA, “[*Dignitas connubii*] Caput II. De appellatione,” in Massimo DEL POZZO, Joaquín LLOBELL, Jesús MIÑAMBRES (eds.), *Norme procedurali canoniche commentate*, Rome, Coletti a San Pietro, 2013, 517, *sub art.* 279 §1 (= PAPPADIA, “[*Dignitas connubii*] Caput II. De appellatione”).

²¹ For a contrary opinion, see Elmar WAGNER, “De iure appellandi,” in *ETC*, 3 (1947), 359–366, at 362, who held that the object of the appeal could include those points in the motivation *in facto* which the victorious party finds objectionable. The appeal would be made in hopes that “the decision might stand on a firmer or more favorable foundation.”

²² See Decree *c. FALTIN, Calatayeronen., Nullitatis matrimonii; Iuris appellandi et competentiae Rotae Romanae*, 23 July 1998, in *RRT Decr.* 16 (1998), 288, nn. 11–12: “... cum propositione ‘se gravatam putat’ intellegitur gravamen dumtaxat in parte dispositiva, obiecto appellationis, ac minime in aliis partibus sententiae.” See also Zenon GROCHOLEWSKI, “L’appello nelle cause di nullità matrimoniale,” in *Forum*, 4 (1993), 29, *sub no.* 4 (= GROCHOLEWSKI, “L’appello”); G. Paolo MONTINI, *De iudicio contentioso ordinario. De processibus matrimonialibus. Pars dinamica*, 3rd ed., Rome, Editrice Pontificia Università Gregoriana, 2012, 523 (= MONTINI, *De iudicio contentioso ordinario*).

²³ The section in the just cited Rotal decree from the cause *Calatayeronen.* concludes: “Illa offensiva putari possunt a parte conventa, sed eidem minime ius appellandi tribuunt, quia nec causae nec appellationis obiectum sunt.”

²⁴ Interlocutory Sentence *c. RAAD, Beryten. Melchitarum, Separationis, pensionis et custodiae filiorum*, 8 March 1976, in *RRT Dec.* 68 (1976) 87, no. 12 (= Interlocutory Sentence *c. RAAD*, 8 March 1976): “... pars decisionem sibi favorabilem appellare nequit. Tamen, cum gravamen sit quid subiectivum, adversus decretum vel sententiam, quae plures aspectus eiusdem rei petitae complectitur, pars victrix appellare potest clausulas quibus se gravatam putat.”

A grievance is not a merely subjective *whim* or an internal *feeling* of justice. It must enjoy a certain objectivity, and this flows from a verification of the juridical interests of the party and the dispositive part of the definitive sentence. That is, a party suffers a grievance when the dispositive part of the sentence is contrary to his juridical interest in the merits of the cause. This contrariety results in an injury or diminution of the rights of the party.²⁵ There has to be “a real interest, that is, ... some injustice deriving from the decision of the judge.”²⁶ And this interest and injustice is generally demonstrable: “[A] party who maintains that he is aggrieved must show and demonstrate his grievance.”²⁷ When viewed from the perspective of the outcome of the appeal, there would actually need to be a correspondence between the appellant’s juridical interest and the reformation of the sentence. For “the appeal is configured as an act that is *substitutional* of the grievance, since it directly leads to a new decision of the cause destined to replace the challenged sentence and to overtake its efficacy.”²⁸ If, on the other hand, the requested reformation of the challenged dispositive part of the sentence would end up causing an objective grievance, one lacks a grievance against the initial sentence.

This objective aspect of the notion of grievance is underscored by identifying the party who is “victorious” in the cause (*pars victrix*) and the one who has been “conquered” (*pars vincta*). In this sense, classic doctrine distinguishes the parties as the appellant (*appellans*) and the appealed party (*appellatus*).²⁹ The definitive sentence may be clearly in favor of one of

Thus, it may happen that one accused of a delict is exonerated by the definitive sentence in a penal cause because the penalty was facultative, because the judge saw reason to defer or abstain from or suspend the observance of a penalty, or because the accused lacked the full use of intellect or will. While partially favorable, he may nevertheless find the dispositive part of the sentence acknowledging his commission of the delict to be unjust and thus introduce an appeal (*CIC* c. 1727 §1, *CCEO* c. 1481 §1).

²⁵ Cf. ROBERTI, *De processibus*, 2: 198, 468 b); Pio Vito PINTO, *I processi nel Codice di diritto canonico: Commento sistematico al Lib. VII*, Vatican City, Pontificia Università Urbaniana, Libreria Editrice Vaticana, 1993, 411, note 594 (= PINTO, *I processi*).

²⁶ See MONTINI, “Capitolo II. L’appello,” 1266, *sub* Canon 1628.

²⁷ Decree c. SERRANO RUIZ, *Parisien.*, *Nullitatis matrimonii; Nullitatis sententiae*, 15 March 1985, in *RRT Decr.*, 3 (1985), 91, no. 3a (= Decree c. SERRANO RUIZ, 15 March 1985).

²⁸ See MONETA, “L’appello,” 771. Cf. Pio CIPROTTI, “*Appellatio*,” in Pietro PALAZZINI (ed.), *Dictionarium morale et canonicum*, vol. 1, Rome, Catholic Book Agency, 1962, 281, no. 2 (= CIPROTTI, “*Appellatio*”); DELLA ROCCA, *Appunti sul processo canonico*, 141; Paolo URSO, “L’impugnazione della sentenza (Cann. 1619-1640),” in GRUPPO ITALIANO DOCENTI DI DIRITTO CANONICO (ed.), *I giudizi nella Chiesa. Il processo contenzioso e il processo matrimoniale*, Quaderni della Mendola 6, Milan, Glossa, 1998, 214.

²⁹ See, e.g., ROBERTI, *De processibus*, 2: 204 and 211, nn. 472 and 478.1; P. TORQUEBIAU, “Chapitre premier: L’appel (Can. 1879-1891),” in Raoul NAZ (ed.), *Traité de droit canonique*, Paris, Letouzey et Ané, Éditeurs, 1948, 346, no. 589, 1°.

the parties and in the disfavor of the other, as is seen most clearly in a cause of rights where there may be a property dispute or an allegation of illegitimate damage to one's good name. The one appealing the decision made in his disfavor is challenging the merits of the decision, and in a sense the appeal is pursued against the one in whose favor the sentence is issued.

In the Church, who prays within the most sacred days of her liturgical year that "*cessent lites*,"³⁰ there is always the aspiration that litigation be avoided if it would not truly promote the discovery of the truth and the good of souls (cf. *CIC* c. 1446 §1, *CCEO* c. 1103 §1). For each of the faithful it is thus profitable and necessary that exercise of the strictly juridical right to appeal, when there is at least an objectively identifiable grievance, should always be weighed in terms of substantive justice. Indeed, from a deontological perspective—that is, as regards the ethical conduct of those engaged in trials—a true grievance ought only to be claimed not merely when one "loses" in the trial but when one is convinced that the unfavorable decision is unjust, that is, not in accord with the truth of the matter. For this is demanded by the principle according to which all participants in the trial should assume the unified purpose of pursuing the truth, as taught by Pius XII in his 1944 discourse to the Roman Rota.³¹ Thus, after reading the text of the definitive sentence, the parties "must reflect on whether, within their own conscience, the decision is just, that is, convincing and corresponding with reality. If they maintain that the sentence is just, they cannot in conscience appeal, even if on the juridical plane their ability to appeal it remains. If they retain that the sentence is unjust, they must in conscience appeal, even if on the juridical plane their ability to abstain from doing so remains."³² In either case, the party does a service to the truth and thus to the good of all involved.

³⁰ "Feria V in Cena Domini. Ad Missam vespertinam," *Missale Romanum ex decreto Sacrosancti Oecumenici Concilii Vaticani II instauratum auctoritate Pauli PP. VI promulgatum Ioannis Pauli PP. II cura recognitum. Editio typica tertia*, Vatican City, Typis Vaticanis, 2008, 303, no. 14; "De Missa solemni vespertina in Cena Domini," *Missale Romanum ex decreto SS. Concilii Tridentini restitutum Summorum Pontificum cura recognitum. Editio typica 1962*, Manlio SODI and Alessandro TONIOLO (eds.), Monumenta liturgica plana 1, Vatican City, Libreria Editrice Vaticana, 2007, 157, no. 1155.

³¹ Cf. PIUS XII, discourse to the Sacred Roman Rota, 2 October 1944, in AAS, 36 (1944), 281-290, esp. 287-288, no. 2e; DELLA ROCCA, *Appunti sul processo canonico*, 143.

³² See Gian Paolo MONTINI, "VI. Dopo la decisione giudiziale: appello e altre impugnazioni," in REDAZIONE DI *QUADERNI DI DIRITTO ECCLESIALE* (ed.), *La riforma dei processi matrimoniali di Papa Francesco. Una guida per tutti*, Milan, Ancora Editrice, 2016, 109 (= MONTINI, "VI. Dopo la decisione giudiziale").

1.2.2 — *The Grievance of the Defender of the Bond*

The notion of grievance thus has both subjective and objective aspects. It is a sense of injustice personally burdening the party, while it is also demonstrable in the lack of correspondence between his juridical interest in the trial and the definitive sentence. The experience of a grievance may be understandable when the object of the trial touches upon one's personal rights; but how can a public official, who is also a party, experience a grievance?

This concerns the public parties: the promoter of justice and the defender of the bond. For both of them it is question of an institutional grievance, not a personal one—even if there could be an element of being personally offended by the judge's rejection of one's argument. Such a grievance is determined by the institutional juridical interest of both parties. The promoter of justice appeals when the definitive sentence, in his judgment, injures the public good in general, including when it violates the law. For example, he can appeal when he deems the sentence in a penal cause insufficiently to repair scandal or restore justice (*CIC* c. 1727 §2, *CCEO* c. 1481 §2).

For his part, “the defender of the bond is bound by the duty of appeal if he thinks that the sentence, which has first declared nullity of marriage, is not sufficiently founded.”³³ Pope Francis has underscored the defender's “duty to appeal, even to the Roman Rota, against a decision he considers injurious to the truth of the bond.”³⁴ Thus, upon issuance of a declaration of nullity of marriage, the defender of the bond is bound by office carefully to examine the text of the whole sentence and weigh in conscience whether it unjustly declares the marriage null on even one ground. If it does, he has an institutional obligation to appeal it, whether it is a sentence issued by a college of judges or a single clerical judge at the end of the ordinary process, or by the bishop of the diocese or eparchy at the end of the abbreviated matrimonial process.

³³ *DC* art. 279 §2: “... defensor vinculi officio appellandi tenetur, si censeat satis fundatam non esse sententiam, quae matrimonii nullitatem primum declaraverit.” This norm assuredly applies to causes of nullity of marriage even after the revision of the norms governing it. The beginning of this norm, however, is clearly obsolete (“Firmo praescripto art. 264,”), being a cross-reference to the derogated norm requiring the *ex officio* transmission of the cause to the appellate tribunal after the marriage had first been declared null (cf. *CIC vetus* c. 1682).

³⁴ See FRANCIS, discourse to the Plenary Session of the Supreme Tribunal of the Apostolic Signatura, 8 November 2013, in *AAS*, 105 (2013), 1153. See also FRANCIS, discourse to the Faculty of Canon Law of the Pontifical Gregorian University, 24 January 2015, in *AAS*, 106 (2015), 193; JOHN PAUL II, discourse to the Tribunal of the Roman Rota, 25 January 1988, in *AAS*, 80 (1988), 1184, no. 12.

While I believe that a critical posture is warranted against the derogation from the requirement of the double conformity of affirmative sentences prior to the parties' entering of a subsequent marriage inasmuch as it reveals a preference for the *favor celeritatis* over the *favor matrimonii*,³⁵ one must admit that it has brought about a certain restoration of the purity of the institute of appeal in causes of nullity of marriage. In the first place, the institution by Pope Benedict XIV of the obligatory appeal of the defender of the bond³⁶—which remained in force through the reform of Pope Paul VI³⁷—while protecting the greater good of the indissolubility of marriage, was accompanied by a certain mechanistic operation in the function of the defender of the bond. For even the one exercising that role diligently had no appropriate margin of discretion in deciding whether or not to appeal a first affirmative sentence, even one that could be seen to be in accord with the truth. This introduced a diminution of the element of the grievance in the institute of the appeal, since the physical person exercising that office might have no real grievance—*rectius*: might not be able to identify even any institutional grievance—but was nevertheless obliged to appeal against the sentence out of institutional principle.

On the other hand, when in 1983 this obligation was transformed into a compulsory transmission of the cause to the appellate tribunal on the part of the judge who issued the affirmative sentence (*vetus* c. 1682), the nature of the appeal in such a case became obscured. For, aside from the fact that the practice of appeal by the defender of the bond in many places fell largely into desuetude, even where there might be an appeal the transmission itself was erroneously (but somewhat understandably) characterized as an appeal.³⁸ Indeed, the fact that it supplanted the obligatory appeal of the defender of the bond, which may have been accompanied by few (if any) motives in practice, did not seem to result in too diverse an institute; rather, the defender

³⁵ See, e.g., my “An Analysis of Pope Francis’ 2015 Reform of the General Legislation Governing Causes of Nullity of Marriage,” in *Jur*, 75 (2015), 450-453 (= DANIEL, “An Analysis”).

³⁶ See BENEDICT XIV, constitution *Dei miseratione*, 3 November 1741, in Pietro GASPARRI (ed.), *Codicis iuris canonici fontes*, vol. 1, Rome, Typis Polyglottis Vaticanis, 1926, 695-701 (= BENEDICT XIV, *Dei miseratione*).

³⁷ See nn. VIII-IX of his *motu proprio Causas matrimoniales*, 28 March 1971, in AAS, 63 (1971), 444-445 and his *motu proprio Cum matrimonialium*, 8 September 1973, in AAS, 65 (1973), 579-580.

³⁸ On the *sui generis* character of this “appeal,” see, e.g., León DEL AMO PACHÓN, “Novísima tramitación de las causas matrimoniales (Comentario a las recientes Normas de la Signatura Apostólica sobre Tribunales y al *Motu proprio* ‘Causas matrimoniales’ de Pablo VI),” in *REDC*, 27 (1971), 459-461.

of the bond was simply relieved of the formal and universal obligation to appeal. Realizing that the transmission of the cause was really an act of the judge, there were some impressions that *the judge* was appealing his own decision, which is obviously nonsense—the judge being the author of the “challenged” act and by no means a party whose juridical situation was in any way affected. There was also the infelicitous notion of the “automatic appeal,” which suffers from an internal contradiction, due to the *prima facie* absence of a grievance as such or any juridical act proposing the adjudication of the cause by the superior judge. It was best to understand this not as an appeal at all but simply as a legislative obligation for the examination of the sentence, *visis causae actis*, in a matter of such grave importance.

The elimination of the absolute obligation to appeal on the part of the defender of the bond in the promulgation of the 1983 code (cf. *vetus* c. 1682 §1) was just, given the nature of the appeal. For it is only one who is aggrieved by a sentence that has standing to appeal it. And while the defender of the bond has an institutional duty to protect the presumed validity of marriage, this duty is always subordinate to the truth of the matter. It was these factors that led the code commission, in the revision of the compulsory appeal, to strive after a balance of two principles: the possibly solid substantive foundation of an affirmative decision on the one hand, and the need for greater diligence in a matter so grave and important as the validity of marriage on the other. In this regard, we read: “Sometimes nullity is so based on solid proofs that an appeal in favor of the bond can be said in itself to be useless. However, in a matter of so much importance, precautions and supports cannot be abolished. The middle way seems useful, by which superior oversight is not removed but is reduced in regard to formalities.”³⁹

In the reform of 15 August 2015, however, the supreme legislator has deemed it suitable to eliminate even that superior oversight. Now, the judge—perhaps being in doubt but disgracefully wishing to refrain from issuing a negative decision or from carrying out additional instruction—may not legitimately transmit the cause to a superior tribunal, since that would be a violation of the principle *nemo iudex sine actore*. The spouses themselves may have no opposition to the declaration of nullity of the marriage—being either desirous of or indifferent toward such a declaration. This places upon the defender of the bond the singular burden of discerning whether he suffers an institutional grievance. After diligently studying the affirmative sentence in light of the acts *prae oculis solum Deum habens*, were he to deem an

³⁹ See “De iure processuali recognoscendo,” in *Comm*, 2 (1970), 190, no. 32a. On concerns with the seriousness of this question, see also *Comm*, 38 (2006), 25-26.

affirmative sentence to have been justly issued, being based on sound jurisprudence and proven facts—that is, when the moral certitude of the judges is well demonstrated and unable to be undermined by any reasonable argument—he is not aggrieved by an affirmative sentence and thus ought not appeal. On the other hand, in accord with that same function, when the affirmative sentence is unjust inasmuch as it does not resolve some prudent doubt about the alleged nullity of marriage (cf. *RP* art. 12), he is bound to appeal since he suffers an institutional grievance. In other words, at the time of the issuance of the definitive sentence, he remains “bound to propose and explain everything which can be reasonably brought forward against nullity” (c. 1432).⁴⁰

1.2.3 — *Appeal against a Favorable Sentence*

Can the party whom the sentence favors appeal against it? In other words, can one whose juridical interests were vindicated by the dispositive part of the sentence declare himself aggrieved by it? As was discussed above, it is in the nature of the appeal to challenge the sentence because it causes a grievance to the appellant. It is not sufficient for the real enjoyment of the right of appeal that one simply be a party to the cause—a petitioner, respondent, or third party, whether private or public. The decision also must be received as an unjust one by the person wishing to appeal; for appealing a decision issued in one’s favor is contrary to one’s juridical interests.⁴¹

⁴⁰ Cf. GROCHOLEWSKI, “L’appello,” 29. How much more ought the defender of the bond appeal if he finds the sentence to be “manifestly unjust” (see BENEDICT XIV, *Dei miseratione*, 699, §11).

⁴¹ Cf. Paolo MONETA, “Apelación judicial,” in *DGDC*, vol. 1, 394 (= MONETA, “Apelación judicial”); IDEM, “L’appello,” 782. In the latter study, however, the same author defends the position about to be described according to which one can appeal a sentence in a cause of nullity of marriage contrary to one’s interests, this being tolerated in the interest of discovering the truth (see *ibid.*, 783).

Some authors (e.g., ARROBA CONDE, *Diritto processuale canonico*, 558-559) hold that the appeal of one who obtained a favorable sentence by deceitful means is an exception to the need for an objective grievance as the basis for appeal. Cited as support for this is a Definitive Decree of the Supreme Tribunal of the Apostolic Signatura, which resolved a series of recourses in a cause of nullity of marriage in which the woman-petitioner requested a new proposition of the cause against two affirmative sentences, since she pursued the cause only under the man-respondent’s threats to remove alimony and child support. (See *Ministerium Iustitiae. Jurisprudence of the Supreme Tribunal of the Apostolic Signatura. Official Text with English Translation*, William L. DANIEL (ed.), Gratianus Series, Montréal, Wilson & Lafleur Ltée, 2011, 11-34, at 13, no. 3 (= *Ministerium Iustitiae*)). These rather unique circumstances do not give rise to the stated exception, in my opinion, since the dispositive part of the affirmative sentences did not correspond with her true interests but were really

While this assertion might seem obvious, it is a matter meriting acknowledgment and further investigation. This is due in part to how typical the “special” matrimonial appellate process (the *processus brevior* “*vetus*”—cf. old c. 1682) became under the regime in force until Pope Francis’ derogation from the requirement of a double conformity of sentences in matrimonial causes (a), and in part to a certain inconsistency of practice (b).⁴²

(a) In the era when only a double conformity of affirmative decisions in a cause of nullity of marriage was executable, the petitioner was accorded, in the mind of some, the right to “appeal” against the first sentence declaring nullity of marriage. Even some authoritative explanations for this were proposed. One was that the private party in a cause concerning the public good could appeal against a decision favorable to himself if he later finds himself aggrieved by it, because such an act could better promote the truth, which is the aim of the process.⁴³

Another stated that, while the affirmative sentence itself favors the petitioner, he or she could be considered aggrieved by the fact that “the first affirmative sentence does not have full effect,” that is, it was not executable. An appeal would be a remedy by which the petitioner could urge the superior tribunal to confirm the sentence as a means of removing the grievance.⁴⁴

an affront against her own dignity and the truth of the matter; thus, there was a true grievance. In any case, this problem was the basis not for an appeal but for a new examination of the cause decided contrary to the truth.

⁴² Decree c. FALTIN, 23 July 1998: 285, no. 8: “[D]octrina et iurisprudencia de iure appellandi partis conventae victric[is] haud sufficienter tractavere, quia plane canon dicit solummodo partem sententia gravatam iure appellandi gaudere.”

⁴³ Cf. Decree c. DI FELICE, *Bellomonten.*, *Nullitatis matrimonii; Iuris appellandi*, 13 July 1985, in *RRT Decr.* 3 (1985), 201, no. 3. “Exinde ex causis de matrimonii nullitate pars, quae se gravatam putat aliqua sententia, in quocumque iudicii gradu etiam iuxta suam praecedentem petitionem prolata, ius habet a sententia appellandi ad iudicem superiorem iuxta generale praescriptum can. 1[6]28. Praevalet nempe hisce in causis principium iuris de necessitate quam maxime acclarandi veritatem in re tanti momenti ...” The respondent in the case had previously made a new proposition of the cause before the Rota after a double conforming declaration of nullity of the marriage. The Rota reformed both sentences, but the man later expressed some interest in a declaration of nullity of the marriage. The cited Rotal decree declared that the man was not truly appealing against the Rotal sentence but enjoyed the right to propose a new cause before a competent tribunal.

⁴⁴ Cf. APOSTOLIC SIGNATURA, Decree, 17 November 1970: 301-302, I.a): “In causis matrimonialibus ius appellandi non modo vinculi Defensori seu parti succumbenti competit, verum etiam *actori*, qui in prima instantia obtinuit sententiam sibi favorem seu declarationem nullitatis, quia in prima sententia affirmativa non habet plenum effectum nisi per alteram sententiam confirmetur” (emphasis in original).

Cf. Fernando DELLA ROCCA, “I mezzi di impugnazione,” in *Il processo matrimoniale canonico*, Vatican City, Libreria Editrice Vaticana, 1988, 331-332 and 336, where the author

This, however, was an appeal only improperly speaking. For it cannot be said that the sentence favoring the petitioner truly caused any grievance. The “grievance” experienced by the petitioner was imposed by the legislator in the abstract norm demanding a double conformity of sentences, while a judicial appeal is made against the definitive sentence applying the law, not against the law.⁴⁵ Properly speaking, the remedy for such a legislatively imposed “grievance” resided in the right of the party to request the confirmation of the sentence.⁴⁶ It may be true that “the opportunity to prosecute his right in the trial is not to be denied the victorious petitioner,”⁴⁷ but this was properly accomplished not by appealing but by taking part in the process to be conducted before the appellate tribunal.

Similarly, to insist that “the deferral of the cause to the superior tribunal, in fact *ex officio*, that is, an *automatic appeal* against a sentence first declaring nullity of marriage, constitutes a grievance in matter and substance” was a strained argument. For, we repeat, and as that argument also recognizes, this deferral was carried out “on account of a very necessity from the law (*ex lege*) to obtain a further judgment”;⁴⁸ it is not something the sentence itself imposes, much less as an element of its dispositive part. This position was not persuasive, because it seemed to have been taken in order to assert the spouses’ equal right to select among equally competent appellate tribunals

observes how the subjective grievance flowing from a sense of injustice was overshadowed by the “objective grievance” a petitioner felt from the obligation of there being a double conformity of sentences before being able to enter a new marriage. Thus, there was a peculiarly shared interest between the defender of the bond and the petitioner in appealing an affirmative sentence: for the one, in order to challenge the merits of the affirmative sentence and, for the other (*impropre dicta*, in my opinion) to challenge the lack of executability of the affirmative sentence.

⁴⁵ See MORHARD, *L'appello nel diritto processuale canonico*, 10, note 25: “L'appello dunque è proposta ‘ratione gravaminis.’ [...] Il detto gravamen però deve risultare dall'applicazione della legge, non dalla legge stessa.” Challenge of a law (which would not be an appeal, properly speaking) could only be made to an organ competent to examine the constitutionality of laws, if the case warrants it (cf. JOHN PAUL II, apostolic constitution *Pastor bonus*, 28 June 1988, in AAS, 80 (1988), 902, art. 158), or by making recourse to the legislator himself (cf. Eduardo LABANDEIRA, “La *remonstratio* y la aplicación de las leyes universales en la Iglesia particular,” in *IC*, 24 (1984), 711-740).

⁴⁶ Cf. ARROBA CONDE, *Diritto processuale canonico*, 559.

⁴⁷ APOSTOLIC SIGNATURA, Decree, 17 November 1970: 302, *sub a*): “Ideo non est deneganda actori vincenti facultas prosequendi ius suum in iudicio.”

⁴⁸ See Decree c. POMPEDDA, 14 December 1992: 207, no. 6: “Attamen delatio causae, quidem *ex officio*, idest *appellatio automatica* adversus sententiam, primum nullitatem matrimonii declarantem, ad superius tribunal, re et substantia gravamen constituit, et ipsi parti pro nullitate certanti, nempe propter ipsam ex lege necessitatem obtinendi ulterius iudicium, eum in finem ut decisio definitiva et executiva pronuntietur” (emphases in original).

ratione gradus, which right was not otherwise recognized in law, since the choice of an appellate tribunal was linked to the act of appealing. The solution proposed was to insist that even the one not aggrieved by the sentence could “appeal.”⁴⁹ This cannot be sustained, however, since it is contrary to the nature of the appeal, as a means of challenging a sentence. This was stated clearly in a 1970 Rotal decree *coram* Pinto in the following terms:

It is most certain that the petitioner cannot appeal in order to request confirmation of a sentence which has declared the nullity of marriage petitioned by him, since this would be against the nature of the institute of the appeal. For in canon law, the appeal is a juridical remedy granted to a party who deems himself aggrieved by the sentence in order to obtain its reformation in his own favor. It is therefore always directed toward challenging the sentence.⁵⁰

Would that this sound analysis had been widely divulged and carefully heeded. For it might have aided in clearly distinguishing the obligatory transmission of the cause to the appellate tribunal for a hierarchical evaluation of the cause (in particular whether the affirmative sentence was to be confirmed) from the transmission of a cause precisely because of an appeal. It may have also pressed the question of the right to choose an appellate tribunal, namely, whether only the appellant or all parties had this choice. As it turned out, the notion of the appeal became somewhat obscured. Now, however, the elimination of the requirement of a double conformity of sentences—while, once again, regrettable in many respects—may also have the benefit of a clarification of this aspect of the appeal.

(b) The question of the right of a party to appeal a sentence issued in his favor has also been a point of conflict among Rotal decisions. In our judgment, however, the proper notion of the appeal prevails when the various positions are weighed. Approximately four—not necessarily mutually exclusive—approaches can be detected in Rotal jurisprudence on this point.

1. The first is seen in a cause *Calatayeronensis* in which the Rota rejected the man-respondent’s right of appeal, since it was made against a negative sentence even though the man was defending the validity of the marriage.

⁴⁹ For contemporary critiques of the decree and the position it advanced, see especially GROCHOLEWSKI, “L’appello,” 24-27, and Joaquín LLOBELL, “La necessità della doppia sentenza conforme e l’‘appello automatico’ *ex can.* 1682 costituiscono un gravame? Sul diritto di appello presso la Rota Romana,” in *IE*, 5 (1993), 602-609.

On the *processus brevior* “*vetus*” of c. 1682 as, not an appeal, but an “obligatory re-examination of the sentence imposed by law for the purpose of ensuring a greater guarantee of conformity with the truth” about the nullity of marriage, see MONETA, “L’appello,” 794.

⁵⁰ See Decree *c. PINTO*, prot. no. 9888, 5 March 1970 (no. 2): quoted in GROCHOLEWSKI, “L’appello,” 24, note 11.

The Decree *coram* Faltin in the case declared this clear principle: “The very nature of the appeal therefore does not allow the party enjoying the favor of the sentence, either the petitioner or the respondent, to be qualified to appeal.”⁵¹ In other words, such an appeal suffers from the defect of an objective grievance.

2. The opposite was declared in a cause *Romana*, wherein the woman-respondent opposed to the declaration of nullity of the marriage both appealed against the negative sentence and did so far outside the peremptory time limits, even after the petitioner had introduced a new cause before a different tribunal, which had already cited the respondent. The Decree *coram* Defilippi, which actually cites the just mentioned decree *coram* Faltin, upheld the respondent’s right of appeal, advancing a broad view of the notion of *gravamen*. It states: “A grievance can be either judicial (i.e., what one suffers in a trial) or extrajudicial (i.e., what one fears he will suffer outside a trial), such that the appeal may be considered a method of defense against it.”⁵² The circumstances for this decision were that the negative decision in the

⁵¹ See Decree *c. FALTIN, Calatayeronen., Nullitatis matrimonii; Iuris appellandi et competentie Rotae Romanae*, 23 July 1998, in *RRT Decr*, 16 (1998), 285-286, no. 8: “Natura ipsa, igitur, appellationis minime permittit ut pars favore gaudens sententiae, sive pars actrix sive conventa, legitimata sit ad appellandum.”

This was affirmed also by the above cited 17 November 1970 decree of the APOSTOLIC SIGNATURA: “appellatio interponitur non ad confirmandum sententiam—quod esset contra instituti appellationis naturam —, sed ad illam *infirmendam* vel *reformandam*” (303, no. I.1, emphasis in original). See also DELLA ROCCA, *Istituzioni*, 328, no. 158.

Notable in this context is the perplexity of another Rotal *turnus coram* Faltin when it received a new proposition of a cause from a man-petitioner whose marriage had been declared null by two decisions favorable to himself. The petition was rejected. See Decree *c. FALTIN, Reginaten., Nullitatis matrimonii; Novae causae propositionis*, 8 October 1997, in *RRT Decr*, 15 (1997) 181-184. Contrary to one opinion (see Augustine MENDONÇA, “The Structural and Functional Aspects of an Appeal Tribunal in Marriage Nullity Cases,” in *StC*, 32 (1998), 456, note 39; = MENDONÇA, “The Structural and Functional Aspects”), the fact that the man’s appeal against the first affirmative decision was accepted does not prove the legitimacy of such an appeal; for the tribunal *ad quod* in the case was obliged by law to examine the cause (cf. *vetus c.* 1682).

⁵² See Decree *c. DEFILIPPI, Romana, Nullitatis matrimonii; Iuris appellandi*, 12 October 2000, in *RRT Decr*, 18 (2000), 225-231, at 229, no. 6 (= Decree *c. DEFILIPPI*, 12 October 2000). The petitioner requested a *restitutio in integrum* against this decree before the Apostolic Signatura, but it rejected the request due to a defect of presupposition, namely, that there was no *res iudicata*. See SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Definitive Decree *c. Davino*, prot. no. 31947/01 CG, 3 July 2004: in G. Paolo MONTINI, “Alcune questioni in merito al can. 1631,” in *Per*, 99 (2010), 336-339 (= MONTINI, “Alcune questioni”); and in Andrés FUENTES CALERO, *Impugnabilidad de las decisiones judiciales “expeditissime,”* Thesis ad Doctoratum in Iure Canonico assequendum, Rome, Lateran University Press, 2013, 244-246 (= FUENTES CALERO, *Impugnabilidad*).

case pertained, *inter alia*, to the man's partial simulation *contra bonum sacramenti*, while the new *libellus* alleged his attachment of a future condition, the two allegations being based on the same juridical facts. The *Turnus* found this to be a formalistic treatment of the same cause only under a different name—"neglecta naturali dinamica processuali,"⁵³ namely, the petitioner failed to appeal against the sentence that aggrieved him. For the *Turnus*, the respondent had a right to prevent this unjust manner of proceeding as an extrajudicial grievance against her marriage by introducing an appeal.

While the sense of justice motivating the latter decision appears sound in many respects, the Rotal *Turnus* may be said to have been overreaching its judicial authority. It entirely ignores the fact that another competent tribunal had legitimately admitted a new *libellus* and cited the respondent, thus obtaining jurisdiction over the cause of nullity of the spouses' marriage (cf. *CIC* c. 1415 and especially c. 1512, 2°). The judgment about the juridical facts in the newly introduced cause vis-à-vis the prior cause was that of the presiding judge in the tribunal of the Vicariate of Rome—namely, through the admission or rejection of the *libellus*. Were it to be clearly a matter of a formally new allegation on the very same juridical facts, the *libellus* could have been rejected on the basis of a *res quasi-iudicata* due to the tribunal's possible absolute incompetence in view of the principle *ne bis in idem*. And the invoked "natural procedural dynamic" would materialize in an *exceptio rei quasi-iudicatae* on the part of the allegedly aggrieved respondent.

One of the decree's arguments in favor of admitting the appeal was the defect of a judicial declaration of the petitioner's desertion of the appeal on the part of the first instance tribunal. However, while it may indeed be necessary for the judge before whom an appeal has been introduced to declare the desertion of the appeal when a party fails to prosecute the appeal, it cannot be said that, lacking such a declaration, the instance was therefore pending as the Rotal decree suggests. With the passage of the peremptory time limits the right of appeal is lost *ipso iure*, and the matter is either restored as a *res integra* or becomes a *res quasi-iudicata*, as the case may be.

3. In a cause *Denveriensis*, the Rota was faced with a tension between the petitioner's right of appeal and the need for a true grievance. The woman-petitioner in the case introduced a cause on the basis of the man's grave defect of discretion of judgment, while the tribunal, with her eventual consent, handled the cause according to the documentary process due to a defect of legitimate form. The marriage was declared null due to lack of the faculty to assist at the marriage on the part of the priest. However, the woman

⁵³ Decree c. DEFILIPPI, 12 October 2000, 231, no. 7.

“wrote to the Most Excellent Dean of the Roman Rota ... requesting that nullity of the marriage be recognized before the Rota on a reason for petitioning other than the one treated before the Denver Tribunal, namely, defect of canonical form.” For the priest had led the woman to believe that the Church supplied the faculty for him. The Rota assumed the cause in view of “the at least formal grievance” (*succumbentia saltem formalis*) of the petitioner. In other words, a certain confusion on her part motivated her to appeal, even though her *petitum* was brought to realization, namely, the declaration of nullity of the marriage. The question of the right of appeal seems to have been at least informally weighed, since the defender of the bond was led to make the appeal his own: “Indeed, in order to take precaution for doubts about the legitimacy of the grievance in the complaint of the petitioner introduced at the Rota, the Defender of the Bond of Our Apostolic Tribunal made the appeal his own and prosecuted it,” while the woman with the help of a procurator-advocate requested the confirmation of the affirmative sentence.⁵⁴ It would seem that the woman sustained not a grievance but nescience about the law governing the faculty to assist at marriage and its supply *ipso iure*. The Rota thus would have been justified in rejecting the appeal due to a defect of a grievance, while also promoting additional measures to help the woman understand and assent to the decision of the tribunal.⁵⁵ The Rota’s competence also could be questioned due to a possible defect of a *legitimate* appeal (cf. c. 1444 §1, 2°). However, with things being as they were, it could be presumed that the introduction of the appeal was legitimate, while any defects of illegitimacy were sanated by the prosecution of the appeal by the defender of the bond.

4. In the just cited cause *Denveriensis*, in spite of doubts about the existence of a grievance, the at least attempted appeal prevented the passage of the marriage declared null into a *res quasi-iudicata*. That was not the case, however, in a cause *Neopolitana*, in which the marriage was declared null due to both parties’ partial simulation *contra bona sacramenti et prolis*, while a negative decision was issued as regards the man-respondent’s perpetration of deceit. The woman made a new proposition of the cause before the Rota which, in an incidental question *de iure appellandi*, rejected the recourse. For, while it seems that she may have had a grievance, being

⁵⁴ See Definitive Sentence c. STANKIEWICZ, *Denverien.*, *Nullitatis matrimonii*, 15 December 1992, in *RRT Dec.* 84 (1992), 665, no. 3.

⁵⁵ Evidently, this ought to have been accomplished by the first instance tribunal *in limine iudicii* in order to be most helpful to the woman and to help her assume more personal responsibility for the cause. Too much pro-activity on the part of tribunals can in fact endanger the validity of the eventual definitive sentence (cf. c. 1620, 4°).

convinced that she was the victim of deceit, the object of the trial had ceased to exist. And so the Rota declared: “The decision enjoys stability; the marriage has been declared null and no longer exists.”⁵⁶

These four decisions about the right of appeal, and in particular about the existence of a true grievance, reveal several principles. In the first place, the existence of a grievance caused by a definitive sentence depends upon the lack of correspondence between one’s juridical interest in a cause and the dispositive part of the definitive sentence. One may not appeal against a decision favorable to his juridical situation, unless some portion of the dispositive part causes a grievance in its own right. Even then, however, a legitimate appeal can only be made when the basic presupposition to the appeal is intact, namely, that the matter has not yet become a *res (quasi-) iudicata*.

1.3 — The Motives for the Appeal

The grievance experienced subjectively by a party and founded objectively in a lack of correspondence between his juridical interests and the dispositive part of the definitive sentence is a phenomenon that is not immediately self-evident. A highly accessible mechanism for discerning its existence in a particular case is to pose the question of *why* the person is appealing or would want to appeal. The concept of grievance then leads naturally into the element of the *motives for the appeal*. Like the grievance itself, it may have subjective and objective elements: one can distinguish the concrete personal motives for appealing from the abstract juridical motives for doing so. A problem that has been treated in doctrine—though not with much depth—is whether the appellant is obliged to express motives and, if so, what exactly must be expressed.

It has been the classical understanding that there needs to be a “just cause” for appealing a decision of one legitimately endowed with the power to decide judicial controversies.⁵⁷ Thus one can rightly speak of an appeal

⁵⁶ See Decree *c. BOTTONE, Neapolitana, Nullitatis matrimonii; Iuris appellandi*, 6 January 2006, unpublished but listed at *RRT Decr.* 24 (2006), v, no. 1; described and quoted by Egidio TURNATURI, “L’appello (artt. 279-289),” in Piero Antonio BONNET and Carlo GULLO (eds.), *Il giudizio di nullità matrimoniale dopo l’Istruzione “Dignitas connubii.” Parte Terza: La parte dinamica del processo*, Studi Giuridici 77, Vatican City, Libreria Editrice Vaticana, 2008, 659, no. 11.

⁵⁷ D.49.1.5: *Marcianus libro primo de appellationibus*. pr. “A sententia inter alios dicta appellari non potest nisi ex iusta causa, veluti si quis in coheredum praeiudicium se condemnari patitur vel similem huic causam ...”

that is just or not (*iusta appellatio*).⁵⁸ Such a cause is commonly described in procedural law as the motives (*motiva*) or the reasons (*rationes*) for an appeal.

The former law made no mention of the expression of motives for an appeal. It said that the *libellus appellatorius* (or the act of introduction of the appeal) had to be submitted to the judge *ad quem* with the prosecution of the appeal (1917 *CIC* c. 1884 §1; *SN* c. 410 §1).⁵⁹ That "*libellus*" may have contained the motives for the appeal, though this was not required. The motives could be presented to the appellate judge in the act of prosecution, but this too was not strictly required; it was sufficient to indicate the sentence being challenged.⁶⁰ The current law mentions no such *libellus*, nor (like the old law) does it require the expression of any motives in the introduction of the appeal:⁶¹ "[A]t this stage, it is sufficient that the party deem himself aggrieved and act within the established time limits."⁶²

⁵⁸ Cf. D.49.1.21.1.

⁵⁹ PIUS XII, motu proprio *Sollicitudinem Nostram*, 6 January 1950, in AAS, 42 (1950), 5-120 (= *SN*). The cited Latin and Eastern canons were almost identical; they read: "Ad prosequendam appellationem requiritur et sufficit ut pars ministerium invocet iudicis superioris [*SN*: appellationis] ad impugnatae sententiae emendationem, adiuncto exemplari huius sententiae et libelli appellatorii quem iudici inferiori exhibuerat."

⁶⁰ Cf. Michele LEGA and Vittorio BARTOCCEITI, *Commentarius in iudicia ecclesiastica iuxta Codicem iuris canonici*, vol. 2, Rome, Anonima Libreria Cattolica Italiana, 1939, 990 (no. 10), 992 (nn. 3-4) (= LEGA-BARTOCCEITI, *Commentarius*); ROBERTI, *De processibus*, vol. 2, 211 (no. 478.1) and 214 (no. 479.1.a)); CIPROTTI, "Appellatio," 282, no. 5.

For a sample appeal of the defender of the bond, which contains no motives, see Felice CAPPELLO, *Praxis processualis ad normam Codicis et peculiarium S. Sedis instructionum*, Turin-Rome, Marietti, 1940, 107, no. 123; similarly, for sample formulae of appeal by the private parties, see Giovanni TORRE, *Processus matrimonialis*, 3rd ed., Naples, M. d'Auria, 1956, 573-574 (nn. 84-85) and 597 (nn. 32-33) (= TORRE, *Processus matrimonialis*). In the era of the *ius vigens*, see GULLO-GULLO, *Prassi processuale*, 290-291.

⁶¹ However, before the Roman Rota, where the appellate structure is internal inasmuch as appeal from one *turnus* is made to the next (*turnus superior seu sequens*—cf. TRIBUNAL OF THE ROMAN ROTA, norms *Quammaxime decet*, 18 April 1994, in AAS, 86 (1994), 537, art. 102 (= *Quammaxime decet*)), the motives are stated in the introduction of the appeal, or the "*appellationis libellus*" (cf. *Quammaxime decet*, artt. 103 and 105; Giovanni PINNA, *Praxis iudicialis canonica*, 2nd ed., Rome, Catholic Book Agency, 1966, 146, no. 2; = PINNA, *Praxis iudicialis canonica*). However, they are not an essential element of the appeal and thus are not required for its validity (cf. Corrado BERNARDINI, *Leges processuales vigentes apud S. Rotae Tribunal*, 2nd ed., Rome, Pontificium Institutum Utriusque Iuris, 1947, 63, *sub* art. 157; = BERNARDINI, *Leges processuales*).

⁶² See *Comm*, 11 (1979), 150, *sub* "Can. 287 (*CIC* 1881-1882)." See also Lourdes RUANO ESPINA, "Apelación en las causas matrimoniales," in *DGDC*, vol. 1, 386 (= RUANO ESPINA, "Apelación en las causas matrimoniales").

It is only within the act of prosecution of the appeal that the current law requires, or at least expects, that the motives be indicated. It establishes: "In order to pursue an appeal, it is required and sufficient that the party call upon the ministry of the superior judge for the emendation of the challenged sentence, having attached a copy of this sentence and indicated the reasons for the appeal (*indicatis appellationis rationibus*)."⁶³ This last passing phrase replaces the former "*adiuncto exemplari ... libelli appellatorii*," which document did not need to include motives; and so the inclusion of motives is a requirement in the general law introduced only in the 1983 code. While it is an added requirement, it is not stated in direct or grave preceptive language, nor is there any indication of the extent of the "reasons" to be indicated. Accordingly, authors are largely in agreement that the motives need only summarily express the grievance caused by the sentence. "It is not necessary that the reasons be analytically specified, but it is sufficient to make reference to a generic injustice" found in or caused by the sentence.⁶⁴ As the Apostolic Signatura has recognized, it is "not that grave causes are required"; "for canon 1634 §1 only requires that the reasons for the appeal be explained, without adding any other requirement."⁶⁵ Such motives could even be limited to the "mere complaints and critical observations" otherwise insufficient for an extraordinary challenge of the sentence (cf. *DC* art. 292 §2)—such as critiques about how the sentence evaluated the proofs, the jurisprudence upon which it was based, or logical errors in the argumentation.⁶⁶

⁶³ *CIC* c. 1634 §1: "Ad prosequendam appellationem requiritur et sufficit ut pars ministerium iudicis superioris invocet ad impugnatae sententiae emendationem, adiuncto exemplari huius sententiae et indicatis appellationis rationibus." Cf. the almost identical *CCEO* c. 1315 §1 and *DC* art. 285 §1.

⁶⁴ See MONETA, "L'appello," 790. See also IDEM, "Apelación judicial," 397; Juan José GARCÍA FAÍLDE, *Tratado de derecho procesal canónico*, 2nd ed., Salamanca, Publicaciones Universidad Pontificia de Salamanca, 2007, 432 (= GARCÍA FAÍLDE, *Tratado de derecho procesal canónico*); Klaus LÜDICKE and Ronny E. JENKINS, "Dignitas connubii." *Norms and Commentary*, Alexandria, VA, CLSA, 2006, 432, no. 2 (= LÜDICKE-JENKINS, "Dignitas connubii." *Norms and Commentary*); Carlos M. MORÁN BUSTOS [the author of the cited section: see 6] and Carmen PEÑA GARCÍA, *Nulidad de matrimonio y proceso canónico. Comentario adaptado a la Instrucción "Dignitas connubii."* Madrid, Dykinson, S.L., 2008, 521, 522; Carmen PEÑA GARCÍA, "La impugnación de la sentencia válida: apelación y proceso *brevior*. La nueva proposición de la causa," in *Anuario Canónico*, 1 (2015), 273-274, 280, 283; Francisco J. RAMOS and Piotr SKONIECZNY, *Diritto processuale canonico: volume 2/2. Parte dinamica*, 3rd ed., Rome, Angelicum University Press, 2014, 196, 197 (= RAMOS-SKONIECZNY, *Diritto processuale canonico*).

⁶⁵ See MONTINI, "Alcune questioni," 323, note 26, citing respectively, its decree of January 27, 2005 (prot. no. 36669/04 VT) and its letter of January 17, 2008 (prot. no. 40532/07 VT).

⁶⁶ Cf. BONI, "La recente riforma," 59, note 180.

Lacking the expression of motives, the right of appeal is not lost, but the judge *ad quem* could insist on it before admitting the appeal.⁶⁷ Presumably this would only be done in a peremptory way if the motives of the appellant could in no way be deduced from the acts or from his *modus agendi* in the trial. Nevertheless, it would be unjust for the appellate judge to demand that the appellant present any new arguments not already considered before the judge *a quo*.⁶⁸ The appeal is based not on some new perspective on the controversy but simply on a grievance caused by the sentence which the judge *ad quem* has in hand and which the legislator asks the judge either to confirm or reform (cf. *CIC* c. 1639 §1, *CCEO* c. 1320 §1). Being the ordinary remedy against a judicial decision, the manifestation of the will to appeal is foundational and, *servatis servandis*, sufficient for having one's appeal received. That the introduction and prosecution of an appeal ought not be a complex matter is supported by the ancient Roman practice of the aggrieved party simply declaring, "I appeal," before the judge in order to put his appeal into motion.⁶⁹

The fact that the articulation of motives is not critical for making use of the remedy of appeal reveals the fact that the appeal may be proposed without needing to fulfill particular conditions of merit, as distinct from what is required in the case of the specific grounds of nullity of a sentence when proposing a complaint of nullity (*CIC* cc. 1620 and 1622, *CCEO* c. 1303 §1 and 1304 §1) or identifying and producing new and grave arguments or proofs when making a new proposition of the cause (*CIC* c. 1644, *CCEO* c. 1325).⁷⁰ This is due to the nature of the appeal which, in the first place, is

⁶⁷ Cf. GULLO-GULLO, *Prassi processuale*, 286, no. 5.

⁶⁸ Cf. Luigi CHIAPPETTA, *Il Codice di diritto canonico. Commento giuridico-pastorale*, vol. 3, F. CATOZZELLA et al. (eds.), 3rd ed., Bologna, Edizioni Dehoniane, 2011, 190, no. 5622 (= CHIAPPETTA, *Il Codice di diritto canonico*); GROCHOLEWSKI, "L'appello," 31. Grochowski points out at *ibid.*, however, that one would always expect the defender of the bond and the promoter of justice to state the motives for their appeals. For, in appealing, they are exercising a public function marked with particular institutional interests; and it would be natural for a public official who is a canonist to offer some appropriate technical argumentation in support of an appeal.

⁶⁹ D.49.1.2: "MACER libro primo de appellationibus. Sed si apud acta quis appellaverit, satis erit, si dicat 'appello.'"

⁷⁰ Cf. Fernando DELLA ROCCA, "Caput II. De appellatione," in Pio Vito PINTO (ed.), *Commento al Codice di diritto canonico*, Rome, Urbaniana University Press, 1985, 927, sub Canon 1628 (= DELLA ROCCA, "Caput II. De appellatione"); PINTO, *I processi*, 410; MONETA, "L'appello," 771; Carmelo DE DIEGO-LORA, "Chapter II. The Appeal," in Ernest CAPARROS et al. (eds.), *Code of Canon Law Annotated*, 2nd ed., Montréal, Wilson & Lafleur Ltée/Woodridge, Midwest Theological Forum, 2004, 1272 (= DE DIEGO-LORA, "Chapter II. The Appeal"); SCHÖCH, "Impugnación de la sentencia," 453; RUANO ESPINA, "Apelación en las

directed toward obtaining a new judgment from the superior judge in the same matter decided by the judge *a quo*. The purpose of the statement of motives is not necessarily to determine the activity of the appellate judge but to contribute to the trial—which can take efficacious form in the possible limitation of the appeal to one of several grounds (cf. *CIC* c. 1637 §§3-4, *CCEO* c. 1318 §§3-4)—and to bring concrete expression to the right of defense.⁷¹ For complaints and critical observations made against the sentence are weighed by the appellate judge, and these can have various results within the trial: a) they can persuade the judge legitimately to admit new proofs at the higher level of jurisdiction; b) they can give impetus to the debate of particular questions during the discussion; and c) they can impel the judge to examine and resolve the appellant's concerns in the definitive sentence, *tam in iure quam in facto*—that is, by drawing out the pertinent juridical principles and by offering argumentation and evaluating the proven facts pertaining to the matter in question.

In causes of nullity of marriage there is a kind of tradition of not requiring the expression of motives, such that one can identify in such causes a true “automatic right of appeal, not conditioned on the motives of appeal, which are not evaluated for the admissibility of the appeal itself.”⁷² The appeal in such causes need not be supported by a lengthy argument. It is sufficient for there to be “the simple manifestation of the essential motives summarily indicating the reasons for the alleged injustice” brought about by the appealed sentence.⁷³ Indeed, “for a simple appeal [as distinct from a new proposition of the cause] on the part of someone who has the right of appeal, only disagreement with the dispositive part of the sentence is required, that is, the wish that it be amended.” It is what “in general for the first time challenges some decision and calls upon the aid of the superior judge to reform it.”⁷⁴ “In an appeal from a definitive sentence, it is not necessary to express in

causas matrimoniales,” 384. See also Craig A. Cox, “Chapter II. Appeal [cc. 1628-1640],” in John P. Beal et al. (eds.), *New Commentary on the Code of Canon Law*, New York/Mahwah, Paulist Press, 2000, 1733 (= Cox, “Chapter II. Appeal [cc. 1628-1640]”).

⁷¹ Cf. MONTINI, “Alcune questioni,” 326-327.

⁷² See MONTINI, “Alcune questioni,” 325.

⁷³ See Decree c. PINTO, *Sinus Viridis, Nullitatis matrimonii; Nullitatis decreti*, 22 June 2001, in *RRT Decr.* 19 (2001) 101-102, no. 3: “... sufficit essentialium motivorum simplex manifestatio, indicatum summatim praesumptae iniustitiae rationes.”

⁷⁴ Decretum c. BOCCAFOLA, *Vilmingtonen., Nullitatis matrimonii; Nullitatis decrei confirmatorii*, 13 January 1988, in *RRT Decr.* 6 (1988), 7, no. 6: “Pro simplice appellatione, proinde, ex parte alicuius qui habet ius appellandi tantummodo requiritur discordia cum parte dispositiva sententiae, seu voluntas illorum emendamentorum. Simplex appellatio, nempe, illa generatim prima vice aliquam decisionem impugnat ac auxilium iudicis superioris ad istam reformationem invocat, unice verum ac purum nomen ‘appellationis’ meritat.”

particular the cause of the appeal, but it is sufficient to state in general that one is aggrieved or that one appeals from an unjust sentence.”⁷⁵

One observes this same fact in the derogated institute of the appeal of the defender of the bond against even a second conforming sentence declaring the nullity of marriage (*pro sua conscientia*). A legitimately introduced appeal could not be rejected after a single or even a second declaration of nullity of marriage, even if it lacked motives. For the juridical order itself provided for these measures as a manifestation of the *favor matrimonii*. Thus, for example, upon receipt of an appeal of the defender of the bond after even a second conforming affirmative decision, the competent appellate judge was obliged simply to proceed with the trial as normal without evaluating the defender’s motives, if any were expressed. We read in the instruction *Provida Mater Ecclesia*: “If after a second sentence in favor of nullity of marriage the defender of the bond should judge according to his conscience to appeal to the third instance, the norm of art. 213 is to be observed.”⁷⁶ That is, the competent official was to proceed to designate the college of judges and the defender of the bond, and the judge was to carry out the citation and continue with an ordinary appellate trial.

The non-obligatory character of providing the motives of appeal in a cause of nullity of marriage is true even before the Roman Rota. In the past, the general rule was that an appeal against a Rotal decision was to contain motives, unless it was the obligatory appeal of the defender of the bond in a matrimonial cause.⁷⁷ The motives in that instance were evident, inasmuch as the juridical order’s inherent orientation toward protection of the bond of marriage is personified in the defender of the bond, whose consistent institutional motive is to actualize this concern. And even if it were one of the spouses appealing, statement of the motives is not required “since in

⁷⁵ Sententia c. PRIOR, *Nullitatis matrimonii*, Decisio XXXIV, 6 August 1915, in *RRT Dec*, 7 (1915), 377, no. 13: “... in appellatione a sententia definitiva non sit necesse causam appellationis in specie exprimere, sed sufficit dicere in genere, se esse gravatum, aut appellare a sententia iniqua.”

⁷⁶ See SACRED CONGREGATION FOR THE DISCIPLINE OF THE SACRAMENTS, instruction *Provida Mater Ecclesia*, 15 August 1936, in *AAS*, 28 (1936), 357, art. 221 §1 (= *PME*).

⁷⁷ The 1910 procedural rules of the Rota somewhat subtly stated this in terms of the appeals that by law were to be introduced in a matrimonial trial: “Appellationis instantia gravaminis motiva complectetur, nisi agatur de appellationibus iure interponendis in re matrimoniali” (TRIBUNAL OF THE SACRED ROMAN ROTA, *Regulae servandae in iudiciis apud Sacrae Romanae Rotae Tribunal approbatae et confirmatae a Pio Papa X*, 2 August 1910, in *AAS*, 2 (1910), 849, § 235.2; = SACRED ROMAN ROTA, *Regulae servandae*, 2 August 1910). The figure of the defender of the bond was more clearly implicit in the subsequent norms of 1934: “Appellationis libellus gravaminis motiva innuere debet, nisi agatur de appellationibus ex officio interponendis” (SACRED ROMAN ROTA, *Normae S. Romanae Rotae Tribunalis*, 29 June 1934, in *AAS*, 26 (1934), 486, art. 157; = SACRED ROMAN ROTA, *Normae*, 29 June 1934).

matrimonial causes the motives do not constitute an essential element of the appeal, considering that it is possible for them to evolve in the allegations.”⁷⁸ Hence, the following is stated in the 1994 Rotal norms (those still in force as of this writing): “The *libellus* of appeal must indicate the motives of the grievance, except in causes concerning the status of persons.”⁷⁹

Thus, it can be concluded that what is essential to the act of appeal, by which one calls upon the jurisdictional ministry of the superior judge for the reformation of a definitive sentence, is the existence of a grievance. This grievance may be personally experienced in diverse ways, but its objectivity is necessary, meaning the disparity it creates between one’s juridical interests and (part of) the dispositive part of the definitive sentence. The expression of at least general motives is required by law in the act of prosecution of the appeal before the tribunal *ad quod*. And while specific motives of a technical and factual character are fruitful for illustrating the grievance and influencing the course of the appellate level of the trial, they are not essential or required.

2 — The Question of the Right of Appeal **(CIC c. 1631, CCEO c. 1313)**

The decision about whether an appeal is “merely dilatory” in a cause of nullity of marriage and therefore whether it even ought to be admitted to trial is a preliminary judgment to be made by the appellate judge. While this is entirely new in modern canonical legislation, the judgment about the admission or rejection of an appeal already existed in the law prior to the issuance of the two *motu proprios* reforming the norms of the marriage nullity process. Since the judgment about the possibly dilatory character of the appeal seems at first glance to fall within the regime for the judgment about the legitimacy or admissibility of the appeal, an examination of the latter is warranted. After an introduction to the judicial examination of the legitimacy of an appeal, the content of the right of appeal will be explored.

2.1 — The Judgment about the Legitimacy of Appeal

At the outset of the ordinary treatment of a judicial cause at the first level of jurisdiction, it is for the approached judge to issue a decree by which the

⁷⁸ See TORRE, *Processus matrimonialis*, 406.

⁷⁹ *Quammaxime decet* art. 105: “Appellationis libellus gravaminis motiva innuere debet, exceptis causis de statu personarum.”

libellus introductorius is admitted or rejected. Since this relates to the fundamental right of Christ's faithful to the judicial protection of their rights (cf. *CIC* c. 221 §1; *CCEO* c. 24 §1), the grounds for the rejection of the *libellus* are listed taxatively in the law. They are: the incompetence of the tribunal, the lack of personal standing on the part of the petitioner, a material defect in the *libellus* itself, and a lack of any foundation whatsoever (cf. *CIC* c. 1505 §§1-2, *CCEO* c. 1188 §§1-2). At the superior level of jurisdiction, while it is not a matter of a *libellus introductorius* but a kind of "*libellus appellatorius*" or "*appellationis libellus*,"⁸⁰ several of these elements analogously apply. In the first place, when there is no just reason to reject the appeal, it is to be admitted by decree of the judge of the appellate tribunal.⁸¹ This may often be as straightforward as the admission of the typical *libellus introductorius*, since often it is immediately clear to the appellate tribunal that the appellant is one of the parties, that the appeal was issued within the peremptory time limits, and that the attached definitive sentence was issued by an inferior tribunal to which it stands in hierarchical relation.

It can happen, however, that a question will arise *in limine* about the right of appeal (*de iure appellandi*)⁸² or about the legitimacy of the appeal already made (*de legitimitate appellationis*).⁸³ This can be raised at the instance of a party (viz., one the private parties or one of the public parties intervening in

⁸⁰ Cf. *CIC*/17 c. 1884 §1; *Quammaxime decet* art. 105; *vide supra* section 1.3.

⁸¹ Cf. no. 8 of the Decree c. ALWAN, *Moronen.*, *Nullitatis matrimonii; nullitatis sententiae*, 25 February 2003, in *RRT Decr.* 21 (2003), 31, and in *IE*, 15 (2003), 744: "Deest appellationis instantia, nisi iudex admittat illam. Absente decreto admissae appellationis, notificatio aut litis contestatio substituunt illam admissionem ..."

Such a decree could be formulated in these terms: "On [date], the act of prosecution of the appeal of N. arrived at the Chancery of this Appellate Tribunal. To it was attached an authentic copy of the definitive sentence issued at the first level of jurisdiction by the suffragan Tribunal of X. Therefore: Having observed that the appeal was introduced before the X. Tribunal on [date], namely, within the peremptory time limit of 15 days (cf. can. 1630 §1 *CIC*), and that it has been prosecuted before this Appellate Tribunal within the peremptory time limit of one month (cf. can. 1633 *CIC*); Since this Appellate Tribunal is clearly competent in the matter; Having weighed the *Votum praevium* of the Reverend Defender of the Bond; In accord with the norm of can. 1640 taken together with that of can. 1505 §1; The undersigned Judge decrees: The appeal in the case is hereby admitted and the parties are cited to the concordance of the doubts."

⁸² See *CIC* c. 1631, *CCEO* c. 1313. See also SACRED ROMAN ROTA, *Regulae servandae*, 2 August 1910: §226.1; *IDEM*, *Normae*, 29 June 1934: art. 159 §1; *PME* art. 215 §2; *Quammaxime decet* art. 106.

⁸³ *DC* art. 282: "Si quaestio oriatur de legitimitate appellationis, de ea videat expeditissime tribunal appellationis iuxta normas processus contentiosi oralis (cf. can. 1631)."

For an analysis of the normative development of the *quaestio de iure appellandi/legitimitate appellationis*, see MONTINI, "Alcune questioni," 308-316.

the trial holding office before the appellate tribunal) or, when the judge has positive doubts about the legitimacy of the appeal, *ex officio*. As is clear from the very precepts of canon 1631, the intentions of the code commission,⁸⁴ and apostolic jurisprudence,⁸⁵ it is not for the judge *a quo* to treat the question of the right of appeal, since his jurisdiction in the matter is exhausted upon publication of the definitive sentence. Moreover, on a human level, it would presumably be difficult for him to examine the matter without having a natural bias in favor of the sentence he issued.⁸⁶ Rather, any judgment about the right of appeal is reserved to the tribunal of appeal.⁸⁷ If the appellant were to introduce the appeal directly before the appellate tribunal, it would be for that tribunal to notify the lower tribunal about the admission or rejection of the appeal, so that it could either transmit an authentic copy of the acts or execute the sentence.⁸⁸

The fact that the appellate tribunal has the faculty to reject certain appeals raises the question of when this may be licitly done. When discerning which juridical situations would justify the rejection of an appeal, it is clearly necessary that one operate out of a strict understanding of the law. For employing the remedy of the judicial appeal is an exercise of a most basic procedural right, which promotes one's substantive rights in the *materia litis*. That is, more generally, it is a question of "the free exercise of rights" (*CIC* c. 18, *CCEO* c. 1500), in particular the right of appeal and the right to defend one's juridical situation before the full judiciary. Accordingly, it has been

⁸⁴ Cf. *Comm.*, 39 (2007), 111.

⁸⁵ Cf. Interlocutory Sentence c. RAAD, 8 March 1976: 87, no. 12: "Tribunalis ad qu[od], non a quo, est iudicare de iure appellandi, de decisionis appellabilitate vel minus, de appellationis admissione vel reiectione." See also Decree c. SERRANO RUIZ, 15 March 1985: 86, no. 2.

⁸⁶ Any party could justly fear that the judge *a quo* "*praeoccupatum animum habeat*" (*CIC* c. 1624). It would seemingly violate the principle *nemo iudex in propria causa*.

⁸⁷ However, this is not precisely so before the Roman Rota, where the *turnus a quo* may reject an appeal *in limine* when there clearly is no right of appeal; but the party aggrieved by that decree may raise the question before the next *turnus* (*Quammaxime decet*, art. 103; see also SACRED ROMAN ROTA, *Normae*, 29 June 1934: 485, art. 155; PINNA, *Praxis iudicialis canonica*, 146). This faculty of the Rotal judge *a quo* to reject an appeal supported by no right cannot justly be applied to all judges, as some propose (see, e.g., MORHARD, *L'appello nel diritto processuale canonico*, 85-86). It may be that there is clearly no right to appeal, such as when a non-party tries to appeal a sentence, when the appeal is directed against not the decision but the judge or when there is clearly no grievance. However, while these may be reasons for the judge gently to suggest to the person the renunciation of such an appeal in order to avoid useless controversy (cf. *CIC* c. 1446 §1, *CCEO* c. 1103 §1), the judge *a quo* has no authority to restrict the right of appeal by his own decree of rejection.

⁸⁸ Cf. *Comm.*, 39 (2007), 125, 160, sub "*Can. 1890.*"

rightly declared that “it is truly unjust to remove the right of appeal.”⁸⁹ One could question why the superior tribunal’s faculty to reject an appeal therefore even exists. The answer flows from a consideration of whether the right to appeal even exists in a particular case.

2.2 — The Content of the Right of Appeal

In its most basic understanding, doctrine used to conceive of the *ius appellandi* as pertaining especially to the question of whether the appealed sentence is subject to appeal.⁹⁰ In other words, a preliminary question, whose adjudication is made possible by the practical requirement of the attachment of a copy of the sentence to the act of prosecution of the appeal, is whether the sentence challenged is one that may even be challenged or, on the other hand, is unappealable by the will of the legislator, as expressed in canon 1629 (*CCEO* c. 1310, *DC* art. 280). If the latter, the party, even should he deem himself aggrieved by such a sentence, does not enjoy the right to appeal it. In addition, a question could arise about the right of appeal if there were doubt about the appellant’s standing in the trial (*legitimitas ad causam*) or the competence of the tribunal *ad quod*.⁹¹

These elements are suggested obliquely in law, which lists those who have active legitimation to appeal and the kinds of acts that cannot be appealed (cf. *CIC* cc. 1628-1629, *CCEO* cc. 1309-1310). Scientific reflection and forensic experience identify three principal bases for the rejection of an appeal as illegitimate: 1) when the appellate tribunal is incompetent, 2) when the appellant lacks the juridical capacity to appeal, and 3) when the peremptory time limits for appealing have expired.

1. An appeal may be rejected when the tribunal *ad quod* is absolutely incompetent. Evidently, this includes an appeal proposed against those sentences listed in canon 1629 (*CCEO* c. 1310, *DC* art. 280)—a matter more complex than need be explored here for our purposes. Related examples are

⁸⁹ See Decree *c. SERRANO RUIZ, Detrouiten., Nullitatis matrimonii; Confirmationis sententiae*, 8 February 1985, in *RRT Decr.* 3 (1985), 31, no. 3: “Iniquum itaque est tollere appellationis ius.” This was stated in a context of abuse of procedural law, namely, the grant of a dispensation of the defender of the bond’s obligation to appeal before the sentence was communicated to the spouses.

⁹⁰ Cf. DELLA ROCCA, *Istituzioni*, 325-327, no. 157; Sabino Alonso MORAN and Marcelino CABREROS DE ANTA, *Comentarios al Código de Derecho Canónico*, vol. 3, Madrid, Bibliotheca de Autores Cristianos, 1964, 627, no. 679; PINNA, *Praxis iudicialis canonica*, 146; Francesco ROBERTI, “De iure appellationis,” in *Ap*, 4 (1931), 136-139.

⁹¹ Cf. TORRE, *Processus matrimonialis*, 411.

identified also in jurisprudence and doctrine. For example, a tribunal would reject an appeal when it is absolutely incompetent *ratione materiae*, as the Roman Rota did when an appeal was made in a penal cause in a matter reserved to the Congregation for the Doctrine of the Faith.⁹² Also, the Rota would justly reject an appeal against a Rotal sentence possibly issued by the whole Rotal college (“*videntibus omnibus*”), since the hierarchy of the Church’s judiciary will have been exhausted. The faculty of appealing to the Supreme Pontiff in such a case would not be a right but could be granted as a favor.⁹³ On the local level, when an appeal is made against a definitive sentence, the appellate judge may need to reject the appeal on account of the matter having become a *res iudicata*⁹⁴ or a *res quasi-iudicata*.⁹⁵

2. The lack of active legitimation for an appeal is verified when one does not personally enjoy a juridically protected right to challenge the sentence. This could occur when one is simply not a party to the trial, or a litigant. In one cause of nullity of marriage, the man’s mother denounced the nullity of marriage to the promoter of justice, who with the consent of the bishop accused the marriage of nullity. The man, who had fathered a child with the woman before marriage, died, and inheritance disputes arose. The civil court

⁹² Cf. Decree of the Dean [FUNGHINI], *Tuamen.*, *Poenalis*, Rep. N. 211/2000, 3 March 2001, in *QSR*, 12 (2002), 167: “infrascriptus ... appellationem reiциendam esse declarat et hoc decreto reicit.” See also Decree of the Dean [STANKIEWICZ], *Leopolitana Ucrainorum*, *Poenalis: excommunicationis maioris*, Rep. 206/06, 18 December 2006, in *QSR*, 17 (2007), 225.

It has been suggested that the right of appeal, with particular reference to competence, could become the object of an eventual declaration of the College of Prelate Judges of the Roman Rota. Cf. Agostino DE ANGELIS, “Le delibere del Collegio Rotale in materia di prassi processuale,” in Janusz KOWAL and Joaquín LLOBELL (eds.), “*Iustitia et iudicium*.” *Studi di diritto matrimoniale e processuale canonico in onore di Antoni Stankiewicz*, vol. 3, Studi Giuridici 89, Vatican City, Libreria Editrice Vaticana, 2010, 1420-1421.

⁹³ Cf. Francesco ROBERTI, “De appellatione a sententia rotali prolata ‘videntibus omnibus,’” in *Ap*, 2 (1929), 75-76. See also *Comm*, 11 (1979), 149 and 39 (2007), 107.

⁹⁴ Cf. Interlocutory Sentence c. STAFFA, *Messanen.*, *Iurium*, Decisio LI, 17 June 1949, in *RRT Decr*, 41 (1949), 300-302; Giuseppe BONDINI, *Del Tribunale della Sagra Rota Romana*, Rome, I Fratelli Pallotta, 1854, 70.

⁹⁵ Cf., e.g., Decree c. POMPEDDA, *Romana*, *Nullitatis matrimonii; Iuris appellandi*, 11 December 1989, in *RRT Decr*, 7 (1989), 190-191 (in fact, there was a triple conformity of negative sentences in the case: two issued by inferior tribunals and, after the grant of a pontifical commission by the Apostolic Signatura, a third by the Roman Rota); Decree c. RAGNI, *Hierosolymitana Latinorum*, *Separationis, pensionis, custodiae filii; Iuris appellandi*, 27 November 1990, in *RRT Decr*, 8 (1990), 184-186; Decree c. COLAGIOVANNI, *Romana*, *Nullitatis matrimonii; Iuris appellandi seu conformitatis sententiae*, 7 April 1992, in *RRT Decr*, 10 (1992), 69-71; Decree c. STANKIEWICZ, *Torontina*, *Nullitatis matrimonii; Novae causae propositionis*, October 22, 1998, *RRT Decr*, 16 (1998), 306; Decree c. Erlebach, *Bononien.*, *Nullitatis matrimonii; Iuris appellandi*, 23 April 1999, in *RRT Decr*, 17 (1999), 102-104.

would not handle any litigation until the ecclesiastical trial was concluded. So the woman petitioned for the revocation of the admission of the *libellus* of the promoter of justice, which petition was rejected by the local tribunal. The woman then appealed to the Rota, which overturned that decision, thus favoring the woman's request for the dissolution of the ecclesiastical litigation. The man's mother declared herself aggrieved by this and thus appealed the Rotal decision to a higher *turnus*. The mother's appeal was rejected, since she was not a party to the dispute about the promoter's *libellus* or a party to the cause at all.⁹⁶ Similar, though perhaps much more delicate, is the case of a victim of an alleged delict, who does not enjoy the right of appeal against a decision in a penal cause, since he is not a party. The promoter of justice is the sole procedural accuser.⁹⁷

Evidently, an appeal somehow coming from a judge or tribunal cannot be admitted *ex natura rei*,⁹⁸ since he or it has no juridical interest in the matter of the trial and such an appeal is contrary to the rationality of the judicial order. Moreover, an inferior judge has no right of appeal against the decision of a superior judge. Even if the superior tribunal handles a cause unjustly or invalidly, the inferior tribunal is not a party. And so this "can never constitute a grievance which grants a faculty for the inferior tribunal to introduce a juridical remedy against the sentence."⁹⁹ Such confusion about one's function would seem to merit self-recusal, the objection of a party, or even transfer to a different ecclesiastical office.

It may also occur when the appellant is a true party but lacks a real grievance.¹⁰⁰ In other words, one is a party with a juridical interest in the object of the trial, but the sentence favors his position. He has a right at stake in the trial, but his right is upheld by the sentence; since his right is intact, he may

⁹⁶ Cf. Definitive Sentence *c. HEARD, Lycien.*, *Nullitatis matrimonii; Incidentis de iure appellandi necnon accusandi matrimonium ex parte Promotoris iustitiae*, Decisio XLII, 20 June 1936, in *RRT Dec*, 28 (1936), 395-401; and the Definitive Sentence *c. JULLIEN [eadem causa]*, Decisio LXXII, 27 November 1937, in *RRT Dec*, 29 (1937), 713-724.

⁹⁷ Cf. Decree *c. CORSO, Panormitana, Iurium*, 11 March 1988, in *RRT Decr*, 6 (1988), 67-69.

⁹⁸ Cf., e.g., Decree *c. POMPEDDA, Bridgeporten.*, *Nullitatis matrimonii; Restitutionis in integrum et iuris appellandi*, 2 May 1988, in *RRT Decr*, 6 (1988), 97-99 (= Decree *c. POMPEDDA*, 2 May 1988); Decree of the Dean [POMPEDDA], *Sancti Ioannis Portoricens.*, *Nullitatis matrimonii*, Rep. N. 135/96, 25 January 1999, in *QSR*, 11 (2001), 124.

⁹⁹ Decree *c. POMPEDDA*, 2 May 1988, 98, no. 10. In this case, the appellate tribunal granted, at the request of the petitioner, a *restitutio in integrum* against the first instance negative decision in a cause of nullity of marriage, and the first instance tribunal attempted to appeal to the Rota.

¹⁰⁰ Cf. PAPPADIA, "[*Dignitas connubii*] Caput II. De appellatione," 520, *sub art.* 282. *Vide supra*, section 1.2.3.

not appeal. This was treated in general and specific terms above in regard to spouses who are party to a marriage nullity trial: the petitioner does not enjoy the right to appeal an executable affirmative sentence, and the respondent who strives in the trial for the validity of the marriage does not enjoy the right to appeal a negative sentence. Moreover, the defender of the bond does not enjoy the right to appeal against a negative sentence—a sentence commonly described, like the defender’s function, as *pro vinculo*.¹⁰¹ Faced with such illegitimate appeals, the appellate tribunal is to reject the appeal.

These two situations of being a party while lacking a grievance are, in a sense, combined when a public minister of justice (defender of the bond or promoter of justice) of first instance intervening at that level appeals against a sentence of the second instance tribunal.¹⁰² For while the official has been a party within the *iter* of the process, his juridical interest is institutional and not personal. As such the defense or promotion of that interest is circumscribed to a particular level of the trial and is preventatively assumed by the physical person holding the same office and deputed at the next level. The original minister of justice therefore lacks the right of appeal outside that procedural circumscription.

A related issue worthy of special mention—albeit a settled one—is that of whether a party legitimately declared absent (*contumax*) enjoys the right to appeal.¹⁰³ There was a tradition¹⁰⁴ according to which the appeal of one who had ignored the citation was held to be unjust, since he had refused to comply with the citation and thus renounced all his rights. Presumably such an appeal was based on no real grievance, since the person was not even motivated to assert and defend his juridical situation or claim during the

¹⁰¹ Cf. GARCÍA FAÍLDE, *Tratado de derecho procesal canónico*, 424; GROCHOLEWSKI, “L’apello,” 28; MENDONÇA, “The Structural and Functional Aspects,” 458; MONETA, “L’apello,” 783.

¹⁰² Cf. Decree *c. DEFILIPPI, Matriten., Nullitatis matrimonii; Nullitatis sententiae*, 21 July 2005, in *RRT Decr*, 23 (2005), 86, no. 5.

¹⁰³ Rather more obsolete is the former loss of right of appeal due to commission of an *attentatum*, viz., approaching the civil forum in the same matter (cf. *CIC/17 c. 1554*). See Sentence *c. WYNEN, Lomzen., Separationis; Incidentis de amisso iure prosequendi appellationem*, Decisio LX, 5 August 1937, in *RRT Dec*, 29 (1937), 594-600. Cf., however, a case where this was treated otherwise, employing canonical equity due to the circumstances of persons and places: Interlocutory Sentence *c. WYNEN, Vicariatus Apostolici Aleppen., Separationis et alimentorum (incidens de inhibitione appellationis vi can. 1554 C.I.C.)*, 30 November 1955, in *RRT Dec*, 47 (1955), 799-804.

¹⁰⁴ In Roman law, see, e.g., D.49.1.23.3; in canon law, see SACRED CONGREGATION OF BISHOPS AND REGULARS, decree *Ad tollendas*, 16 October 1600, in *Codicis iuris canonici fontes*, vol. 4, 689, no. 14.

judicial exchange of the trial and was likely motivated by malice and not zeal for justice. This tradition was received into the Pio-Benedictine code¹⁰⁵ after the question had been raised a number of times in jurisprudence.¹⁰⁶ The 1983 revision of the 1917 code, however, derogated from the cited norm. For it not only eliminated the rule of the unappealability of a sentence issued against a contumacious party on the part of that party. It also expressly grants in canon 1593 §2 the absent party's right "to use challenges" (*impugnationes*) against the sentence, not merely to employ the extraordinary remedy of *restitutio in integrum* (cf. 1917 *CIC* c. 1847).¹⁰⁷

3. The expiration of the peremptory time limits for appealing is a commonly recognized ground for loss of the right of appeal.¹⁰⁸ While the computation of time limits may seem such a formal task, and while it may seem too strict to tell someone that he has lost the right of appeal even if he is but one day late, the existence and compliance with such time limits is an important demand of justice. After the momentous and serious work of the judicial process has been solemnly completed, it is such time limits that ensure the parties juridical certitude about their rights and their (possibly) new juridical situation. For, by the passage of the time limits without appeal, the controversy is brought to resolution by reaching the end of the trial (*ad finem litis*).¹⁰⁹ When this happens, "one who can appeal and does not appeal in the useful time is presumed by law to consent to the sentence that has been issued."¹¹⁰ And apart from causes concerning the status of persons (*CIC* c. 1643, *CCEO* c. 1324, *DC* art. 289 §1), the controversy thereby becomes a *res iudicata* (*CIC* c. 1641, 2°; *CCEO* c. 1322, 2°).

There is a peremptory time limit in relation to both the introduction and the prosecution of the appeal. Upon receipt of a copy of the definitive

¹⁰⁵ "Can. 1880. Non est locus appellationi: [...] 8° A sententia contra contumacem, qui a contumacia se non purgaverit; [...]." See also *SN* c. 404, 8°.

¹⁰⁶ See, e.g., Definitive Sentence *c. HEINER, Suspensionis a divinis ac iurisdictionis*, Decisio XIX, 23 May 1910, in *RRT Dec*, 2 (1910), 178-183, nn. 20-27 (published also in *AAS*, 2 (1910), 747-768); Definitive Sentence *c. LEGA, Coloniensis seu Monasteriensis, Suspensionis et iurisdictionis*, Decisio XXIII, 31 May 1912, in *RRT Dec*, 4 (1912), 283-285, no. 16; Definitive Sentence *c. PRIOR, Cappellaniae laicalis*, Decisio XXXI, 6 December 1916, in *RRT Dec*, 8 (1916), 348, nn. 3-4.

¹⁰⁷ For application of this norm in jurisprudence, see, e.g., Decree *c. SERRANO RUIZ, Arausicana in California, Nullitatis matrimonii; Nullitatis sententiae et Novae causae propositione*, 22 November 1985, in *RRT Dec*, 3 (1985), 250-251, no. 6.

¹⁰⁸ Cf. COX, "Chapter II. Appeal [cc. 1628-1640]," 1735, *sub* Canon 1631.

¹⁰⁹ Cf. Decree *c. DEFILIPPI*, 12 October 2000, 227, no. 4.

¹¹⁰ Sentence *c. PRIOR, Aegypti, Nullitatis matrimonii; Quaestionis incidentalis de re iudicata*, Decisio XIX, 20 June 1922, in *RRT Dec*, 14 (1922), 191-192, no. 3: "qui appellare potest et tempore utili non appellat, sententiae latae consentire iure praesumitur."

sentence—whether by one’s person or knowingly at one’s home—beginning the next day, a party (personally or through his procurator) has fifteen days to introduce an appeal before the judge *a quo*.¹¹¹ If the sentence does not reach one of the parties, the period of time allotted by law does not yet begin to run, even if the sentence has reached the other parties.¹¹² This period of time is established by the legislator and may not be lengthened or, unless the public and private parties all request it, validly shortened (cf. *CIC* c. 1465 §1, *CCEO* c. 1124 §1, *DC* art. 81 §1).

Upon receipt of the introduction of the appeal at the chancery of the tribunal, beginning the next day the appellant has the period of one month¹¹³ to present the act of prosecution of the appeal before the appellate tribunal. This period may be extended by decree of the judge *a quo* if difficulties in communication, distance or personal circumstances warrant it (cf. *CIC* c. 1633, *CCEO* c. 1314, *DC* art. 284 §1). Placing the act of prosecution within the period of one month (viz., mailing it to the tribunal within that period) is sufficient, despite the fact that it may arrive at the tribunal *ad quod* beyond such time limits. This may even be due to the fact that the appellant erroneously sent it to the incorrect place (e.g., to the office of the vicar general instead of the tribunal), even while the intent to approach the competent superior judge was clear and the error does not touch upon the substance of

¹¹¹ Cf. *CIC* cc. 203 §1, 1615, 1630 §1; *CCEO* cc. 1298, 1311 §1, 1546 §1; *DC* artt. 258 §1, 281 §1. If the tribunal insists on publishing the sentence by informing the parties by letter of their right to obtain a copy at the chancery of the tribunal, the time period begins to run the day after receipt of that letter (see GROCHOLEWSKI, “L’appello,” 33, citing an October 3, 1993 decree of the Supreme Tribunal of the Apostolic Signatura, prot. no. 22750/91 VT). This ensures that the instance not pend indefinitely when a party’s silence can induce the presumption that he has waived the right to read the sentence. It needs to be recognized, however, that this practice is somewhat inflexible and in tension with the norm of canon 1615; for being willing to hand over a copy of the sentence in person is not the same thing as handing over a copy of the sentence (“*tradendo exemplar sententiae*”).

¹¹² For an example in which a problem in the notification of publication caused a delay in the passage of the peremptory time limit for the respondent’s appeal, see Decree c. TURNATURI, *Beryten. Maronitarum, Nullitatis matrimonii; De iure appellandi*, 10 May 2001, in *RRT Decr*, 19 (2001), 77-79.

¹¹³ While this is equivalent in principle to 30 days (*CIC* c. 202 §1, *CCEO* c. 1545 §1), it is computed in the particular case according to the date, viz., the day of the months involved (*CIC* c. 203 §2 *CCEO* c. 1546 §2). Thus, e.g., if the party receives a copy of the definitive sentence at his home on January 5, the month-long period begins to run on January 6 and is completed at the end of the day of February 6 (unless that tribunal is closed on that day, in which case it is extended to the next tribunal business day). However, if the sentence is received on January 29, the period begins to run on January 30 and is completed at the end of the day February 28 (or 29 in a leap year).

the act.¹¹⁴ As was mentioned above, the act of prosecution of the appeal may also be entrusted to the judge *a quo* with a request for its transmission to the appellate tribunal (DC art. 284 §2). Nevertheless, the pursuit of the appeal remains the responsibility of the appellant, who bears the burden of ensuring that the appeal is being transmitted in due time. In other words, the legitimacy of the appeal does not depend upon a private agreement between the appellant and the tribunal whose sentence is being challenged.¹¹⁵

It has long been the common understanding that great indulgence is shown in causes of nullity of marriage with regard to the time limits for appealing a negative sentence;¹¹⁶ they are in effect non-existent. For the general rule according to which a non-appealed sentence becomes a *res iudicata* does not apply to such causes, which can never materially become a *res iudicata*. They do become a *res quasi-iudicata*, but they are not governed by the strict principles of *res iudicatae*. On the other hand, the right of *appeal*, properly speaking, has to be considered to have been lost, since definitive sentences in marriage nullity trials are governed by the general norms on appeals.¹¹⁷ Nevertheless, the right to reintroduce the cause is not lost due to expiration of the peremptory time limits; the aggrieved party requests the retreatment (*retractatio*) of the cause at the next level of jurisdiction, and the competent superior tribunal may not reject it due to the expiration of the

¹¹⁴ This occurred in a case in which the one appealing to the Roman Rota erroneously pursued the appeal before the Sacred Congregation of the Council. See Decree *c. PARRILLO, Hieracen., Iurium; Incidentis de appellationis desertione*, Decisio I, 9 January 1926, in *RRT Dec*, 18 (1926), 1-3. For the same principle, see Sentence *c. PARRILLO, Corduben., Restitutionis Ecclesiae (causa incidentalis de legitimitate appellationis et de restitutione in integrum)*, Decisio XXXII, 12 July 1929, in *RRT Dec*, 21 (1929), 271, no. 2. In that case, however, the right of appeal was lost due to non-pursuit of the appeal before the Rota outside the peremptory time limits (see 275-277, nn. 8-11).

¹¹⁵ Cf. Interlocutory Sentence *c. MORANO, Miletan., Praecedentiae; Incidentis de appellationis legitimitate*, Decisio LIV, 12 August 1929, in *RRT Dec*, 21 (1929), 451-457. At no. 7 (454), where it notes that the tribunal *a quo* sent the appeal to the tribunal *ad quod* over a month after its presentation, we read: "Neque in hac retardatione quaerenda est aliqua culpa Curiae Miletensis, quia onus adeundi tempore utili Tribunal appellationis eique exhibendi documenta necessaria pro appellationis prosecutione astringit ipsam partem appellentem, dum validitas appellationis nullo pacto pendet ex transmissione actorum facienda per Tribunal, a cuius sententia appellatur." This was especially so in the case because the appellant did not clearly request the transmission of the acts to the appellate tribunal or present a copy of the appealed sentence to it.

¹¹⁶ See Definitive Sentence *c. WYNEN, Heliopolitana Maronitarum, Appellationis, nullitatis matrimonii et alimentorum*, 10 May 1952, in *RRT Dec*, 44 (1952), 296, no. 5.

¹¹⁷ See *CIC* cc. 1679, 1691 §3; *CCEO* cc. 1365, 1377 §1.

peremptory time limits, since that would be tantamount to declaring that the matter had become a *res iudicata*.¹¹⁸

Such indulgence, however, is not shown towards the non-observance of peremptory time limits after an affirmative sentence is issued in causes of nullity of marriage, and this was true even prior to the reform of Pope Francis. This disparity flows from the nature of the affirmative and negative sentences in such causes. A negative sentence declares not that the validity of the marriage is proven—since, out of respect for marriage, the stability of society and the human dignity of the spouses, its validity is already presumed by law—but that the alleged nullity of the marriage is not proven. It is not only a verbally negative decision but negative in substance: what was alleged is not established and therefore nothing has changed in the juridical condition of the spouses, who remain putative spouses. Because nothing has changed, the definitive sentence has no juridical implications for the lives of the spouses (though there may be moral implications) or for the immediate future of the cause. An affirmative sentence, on the other hand, has profound

¹¹⁸ On the *retractatio* as a *via media* between the appeal and the new proposition of the cause, see Joaquín LLOBELL, “Verità e giudicato. La riformulazione del concetto di appello canonico,” in *Verità e definitività della sentenza canonica*, Studi Giuridici 46, Vatican City, Libreria Editrice Vaticana, 1997, 32; SCHÖCH, “Impugnación de la sentencia,” 454. Cf. art. 217 §1 of the instruction *Provida Mater Ecclesia*: “Cum sententiae in causis matrimonialibus numquam transeant in rem iudicatam, causae ipsae *retractari* poterunt coram tribunali superiori, non exceptis casibus in quibus appellatio defuerit vel deserta aut perempta fuerit” (356, emphasis added). Such a norm was almost included explicitly in the instruction *Dignitas connubii*, but it was omitted (cf. *Instructionis “Dignitas connubii” synopsis historica*, FACULTAS IURIS CANONICI (ed.), Diritto Canonico 4, Rome, Gregorian & Biblical Press, 2015, 264-265).

See also SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Declaration, prot. no. 20598/88 VT, 3 June 1989, in *Ministerium Iustitiae*, 665, no. 4; Definitive Sentence c. PASQUAZI, *Romana*, *Nullitatis matrimonii*, Decisio XXIX, 18 May 1948, in *RRT Dec*, 40 (1948), 175-176, no. 10; Definitive Sentence c. COLAGIOVANNI, *Panormitana*, *Nullitatis matrimonii*, 25 May 1982, in *RRT Dec*, 74 (1982), 291, no. 2 (“practice appellatio in causis matrimonialibus, etiam fatalibus non observatis, semper admittitur (...), etsi potius de reassumptione loquendo esset”); Definitive Sentence c. DE LANVERSIN, *Spalaten-Macarscen.*, *Nullitatis matrimonii et iuris appellandi*, 15 May 1997, in *RRT Dec*, 89 (1997), 386-387, nn. 5-6; Decree c. DEFILIPPI, 12 October 2000, 227-228, no. 4; Decree c. STANKIEWICZ, *Birminghamien.*, *Nullitatis matrimonii*; *Nullitatis sententiae*, 8 March 2002, in Antonio FANELLI, *Relatio super jurisprudentia de ritu in Decisionibus Incidentibus et Praeliminaribus latis a Tribunali Apostolico Rotae Romanae, a nova Codificatione Iuris Canonici usque ad praesentiarum*, vol. 4, Vatican City, Libreria Editrice Vaticana, 2005, 121, no. 9 (unpublished in *RRT Decr*, 20 (2002): see iv, no. 18).

For a fuller treatment on this matter in English, see my “Remedies Available to the Petitioner in a Cause of Marriage Nullity After the Right to Appeal Has Been Lost,” in *SCL*, 5 (2009), 479-484.

juridical implications, the chief of which is the right of the private parties (unless they are prevented by any *vetita*) to enter marriage with another person. Prior to December 8, 2015, the immediate implication was that the cause had to be transmitted within 20 days to the tribunal of appeal. In either case, the affirmative sentence establishes new rights and obligations. Now, once the peremptory time limits for appealing an affirmative sentence have passed without action, the alleged nullity of marriage becomes a *res quasi-iudicata*, the sentence becomes executable, the right of appeal is lost, and the merits of the sentence can only be challenged before the tribunal of the third level of jurisdiction by a new proposition of the cause when there are new and grave proofs or arguments (*CIC* c. 1681, *CCEO* c. 1367).

2.3 — Lack of Foundation of an Appeal

The previous sub-section demonstrates that there have long been certain peacefully accepted general grounds on the basis of which a party would be seen not to enjoy the right of appeal, thus giving rise, in the face of an attempted appeal, to an incidental question about the legitimacy of the appeal and eventually a decree of rejection of the appeal *in limine* by the appellate tribunal. These grounds concern the incompetence of the appellate tribunal, the lack of active legitimation on the part of the appellant, and the expiration of the peremptory time limits. In the contemporary period of the Church's discipline up until the reform of Pope Francis, these grounds were consistently and taxatively indicated by doctrine and jurisprudence—even if they were presented in various terms.

However, a minority position among the authors suggested a fourth category which is worthy of special attention here, since it may seem to coincide with the newly legislated class of appeal described as merely dilatory. According to this position, the tribunal *ad quod* enjoyed the faculty to reject an appeal that lacked any foundation whatsoever, that is, one which did not enjoy the *fumus boni iuris*. This idea was based on an analogous application of the norms governing the admission or rejection of the introductory *libellus* (*CIC* c. 1505 §2, 4°; *CCEO* c. 1188 §2, 4°) to the admission or rejection of the appeal. Support for this was claimed to be found in canon 1640 (*CCEO* c. 1321) according to which, “[a]t the level of appeal, the process is to be carried out in the same manner as in first instance, with the appropriate adjustments being made.” Thus, since the introductory *libellus* is to be rejected when it is certain that it altogether lacks foundation and that no such foundation could emerge from a trial, the appeal was to (could) be rejected when it lacked any foundation according to the same understanding. It was

admitted, however, that it is likely more common for the question of said foundation to be examined in the appellate trial itself, and not *in limine*.¹¹⁹

This view, however, cannot be admitted. The norm of the cited canon 1640 of the *CIC* and canon 1321 of the *CCEO* presume that the cause is pending before the appellate tribunal. They intend rather to prescribe the *modus procedendi* within the appellate level of the trial, which is why they immediately (without a full stop) continue to describe the dynamic part of the pending instance—namely, the legitimate formulation of the doubt, the possible supplementary instruction, the discussion, and the definitive sentence.¹²⁰ And this is natural, since there is a dramatic difference between the admission of the introductory *libellus* and the admission of the appeal. At the time of the former, the petitioner bears the burden of demonstrating the existence of some right on the basis of which he is introducing litigation (*CIC* c. 1504, 2°; *CCEO* c. 1187, 2°). At the time of the latter, on the other hand, he is relieved of this burden, inasmuch as the matter, not yet become a *res (quasi-)iudicata* and no longer a *res integra*, is still a *res litigiosa*; and the judicial vindication of one's rights (cf. *CIC* c. 221 §1, *CCEO* c. 24 §1) extends traditionally in the canonical order, as in most or all juridical orders, to the right to appeal. It would be unjust for there to be a *iudicium ante iudicium* on the merits of the cause, that is, a judgment about the merits of the appeal before the appellant has had an opportunity to defend himself before the appellate judge. Moreover, as Montini declares: “[T]he (admission of the) appeal is not conditioned on the allegation of particular reasons for the appeal, and therefore an examination of the foundation of the *rationes appellationis* is not contained in the *quaestio de iure appellandi* of canon 1631.” To transform the decision about the admission of an appeal “into an abbreviated treatment of the appeal” or “an examination identical to that of

¹¹⁹ Cf. MORHARD, *L'appello nel diritto processuale canonico*, 55. At 91-94 and 135, the author considers whether the question of the right of appeal need be raised by one of the parties or whether it may be raised *ex officio* by the judge. For a pre-1983 application of the norms for the rejection of the *libellus* to the rejection of an appeal, see Loras T. LANE, *Matrimonial Procedure in the Ordinary Courts of Second Instance*, Canon Law Studies no. 253, Washington, D.C., The Catholic University of America, 1947, 108-111. The latter does not argue the position in any depth but only assumes its legitimacy and draws out its procedural implications.

¹²⁰ “[*CIC*] Can. 1640. In gradu appellationis eodem modo, quo in prima instantia, congrua congruis referendo, procedendum est; sed, nisi forte complendae sint probationes, statim post litem ad normam can. 1513, § 1 et can. 1639, § 1 contestatam, ad causae discussionem deveniatur et ad sententiam.”

“[*CCEO*] Can. 1321. In gradu appellationis eodem modo ac in primo gradu iudicii congrua congruis referendo procedendum est; sed, nisi forte complendae sunt probationes, statim post litem contestationem ad causae discussionem deveniatur et ad sententiam.”

the *libellus litis seu causae introductorius*” is to “betray its nature, restricting the rights of the faithful in an unjust manner.”¹²¹

This is implicitly confirmed elsewhere in canonical doctrine¹²² which, like the already cited jurisprudence, recognizes the scenarios treated above in section 2.2 as those justifying the rejection of the appeal. Moreover, apostolic jurisprudence itself has rejected this application of canon 1505 §2, 4° (*CCEO* c. 1188 §2, 4°) to the moment of the admission or rejection of an appeal.

In a cause *Ratisbonensis* concerning nullity of marriage, the ordinary appellate tribunal rejected the appeal of the petitioner against the first instance negative sentence, citing canon 1640 together with canon 1505 §2, 4°. Against this decree, the petitioner made recourse to the Roman Rota, which reformed the decree of rejection and admitted the appeal before the Rota after the cause had been legitimately called to it (*avocatio causae*). The Rotal *turnus* in the case declared that an appeal could not be rejected *in limine* when in the judgment of the tribunal *ad quod* the appeal lacked substantive foundation. It held it to be erroneous to apply the norms for admission or rejection of the introductory *libellus* to the appeal; for the appeal is rejected only when the sentence clearly admits of no appeal or the appeal is made outside of the peremptory time limits. Lacking these grounds, the appellate tribunal was bound to proceed with the appellate trial.¹²³

The Supreme Tribunal of the Apostolic Signatura, in exercising vigilance over the correct administration of justice, has declared likewise in the matter. For example, a local tribunal issued a negative sentence in a cause of nullity of marriage pertaining to the woman-respondent’s alleged lack of internal

¹²¹ See MONTINI, “Alcune questioni,” 329, 343 (*sub* “Conclusionone”). Cf. IDEM, *De iudicio contentioso ordinario*, 537.

¹²² Cf. John P. BEAL, “Remedial Readings: Challenges to Sentences in Marriage Nullity Cases,” in *Jur*, 59 (1999), 15, *sub* B.; CHIAPPETTA, *Il Codice di diritto canonico*, 186-188, nn. 5609-5616; Carmelo DE DIEGO-LORA, “La doctrina procesal de Mons. León del Amo,” in *IC*, 35/36 (1978), 535-536, no. 7.9.3; Raffaello FUNGHINI, “La competenza della Rota Romana,” in *Le “Normae” del Tribunale della Rota Romana*, Studi Giuridici 42, Vatican City, Libreria Editrice Vaticana, 1997, 155; LÜDICKE-JENKINS, “*Dignitas connubii*,” *Norms and Commentary*, 457, no. 1; MONETA, “L’appello,” 792; MONTINI, “Capitolo II. L’appello,” 1267-1268, *sub* Canon 1631; IDEM, “Alcune questioni,” 343 *et passim*; Francisco J. RAMOS, *I tribunali ecclesiastici. Costituzione, organizzazione, norme processuali*, Rome, Pontificia Università S. Tomasso D’Aquino, 1998, 459; RAMOS-SKONIECZNY, *Diritto processuale canonico*, 234, no. 3; RUANO ESPINA, “Apelación en las causas matrimoniales,” 384.

¹²³ See Decree c. PINTO, *Ratisbonen., Nullitatis matrimonii; Admissionis appellationis*, 27 February 1987, in *RRT Decr*, 5 (1987), 41-43.

freedom and error concerning the unity, indissolubility, and sacramental dignity of marriage. The man introduced and pursued an appeal within the peremptory time limits, bringing forward as the sole motive for the appeal the fact that the woman had committed adultery. The appellate judicial vicar therefore rejected the appeal at the outset. However, when the matter was deferred to it, the Apostolic Signatura declared:

The Very Reverend Judicial Vicar of the Metropolitan Tribunal of X, although he quite correctly observed that adultery is not an argument for the nullity of marriage, wrongly rejects the appeal at the outset; for the institute of the rejection of the *libellus* introducing the cause due to lack of any foundation whatsoever (cf. c. 1505 §2, 4°) does not refer to the acceptance of an appeal or not, as is clear from canon 1634 §1.

The metropolitan tribunal in the case was urged by the Signatura “no longer to reject a duly proposed appeal due to an alleged lack of foundation.”¹²⁴ This intervention reinforces the rule that it is sufficient for the appellant to present some reasons for the appeal, but their degree of persuasiveness (or not) does not justify rejection of the appeal.

The same Supreme Tribunal, acting as a judicial organ, also declared the illegitimacy of examining the foundation of an appeal at the outset of the trial, when this was carried out by the Roman Rota. It did this when it granted a *restitutio in integrum* in a cause of rights (*iurium*)—namely, concerning the just use of certain church buildings by an association of the faithful—decided before the Roman Rota. One of the Rotal *turni* declared the conformity of two Rotal sentences in the matter, but one of the parties appealed against this declaration, since there seemed to be some points of disparity between the two Rotal sentences. The subsequent Rotal judges, who received this appeal, chose not to treat the appeal but to handle the matter as a question concerning the right of appeal. It then rejected the appeal and declared the conformity of the two Rotal sentences. The Signatura determined that this decree rejecting the appeal in effect denied the right of appeal inasmuch

¹²⁴ SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Decree, prot. No. 22424/91 VT, 17 May 1991, in MONTINI, “Alcune questioni,” 320, 321: “‘Perpenso quod Rev.mus Vicarius iudicialis Tribunalis Metropolitanus X, quamvis omnino recte animadverteret adulterium non esse rationem nullitatis matrimonii, immerito appellationem a limine reicit; institutum enim reiectionis libelli causam introductorii ob defectum cuiuslibet fundamenti (cfr. can. 1505, §2, 4°) sese non refert ad acceptandam appellationem, vel minus, ut ex can. 1634, §1, patet.’ Il tribunale metropolitano coinvolto era invitato a ‘ne amplius appellationem rite propositam ob assertum defectum fundamenti reiciat.’” The author cites at 321 two additional interventions of the Signatura of the same substance, namely, a decree of January 27, 2005 (prot. no. 36669/04 VT) and a letter of January 17, 2008 (prot. no. 40532/07 VT).

as it judged the appeal to lack foundation at the outset, without entertaining even a summary trial.¹²⁵

In view of the rationality of the procedural order and the firm jurisprudence in the matter, it is clear that an appellate tribunal has no obligation or right to reject an appeal *in limine* when it seems to lack any foundation whatsoever. In other words, a party who is aggrieved by a sentence but whose reasons for appealing lack substantive or persuasive value is not for that reason deprived of the right of appeal. This fact was and remains valid for the Church's judiciary governed by these norms of the ordinary contentious trial. This is important background for our discussion below on the nature of the "merely dilatory appeal" envisioned in trials concerning nullity of marriage, since one sense that expression could have pertains to the merits or motives of the appeal.

2.4 — Challenge of the Decision *De iure appellandi*

The canons in the two codes regulating this matter state that the question *de iure appellandi* is to be decided *expeditissime*, as quickly as possible. This has the juridical consequences of ensuring a more rapid resolution to the matter in contention (*materia litis*) and of being resolved by an unappealable decision.¹²⁶ For listed among the unappealable decisions are decrees to be issued when "the law provides that the matter is to be decided *expeditissime*" (*CIC* c. 1629, 5°; *CCEO* c. 1310, 5°; *DC* art. 280, 5°). Therefore, it is subject to no appeal.

The possibility of some challenge of a decree of rejection of an appeal was formerly indicated in the proper law of the Sacred Roman Rota. Previously, in the case of the Rota rejecting an appeal at the outset of the trial, the aggrieved party could not appeal the decision to the next *turnus*, but he could make recourse to the Apostolic Signatura.¹²⁷ Now, however, the situation has changed. Despite the fact that the 1983 code generically envisions "other recourses" that could be made to the Signatura against acts of the

¹²⁵ Cf. SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Definitive Sentence c. CAFFARRA, prot. no. 41767/08 CG, 5 September 2009, in MONTINI, "Alcune questioni," 340-343; and in FUENTES CALERO, *Impugnabilidad*, 246-248.

¹²⁶ Cf. *Comm*, 11 (1979), 150; DELLA ROCCA, "Caput II. De appellatione," 930, *sub* Canon 1631; Juan Luis ACEBAL, "Capítulo II. De la apelación," in *Código de Derecho Canónico. Edición bilingüe comentada*, 11th ed., Madrid, Biblioteca de Autores Cristianos, 1992, 794, *sub* Canon 1631; GROCHOLEWSKI, "L'appello," 36; PINTO, *I processi*, 419, no. 160; DE DIEGO-LORA, "Chapter II. The Appeal," 1274-1275, *sub* Canon 1631.

¹²⁷ See *Regulae servandae*, 2 August 1910, 848, §226.2; *Normae*, 29 June 1934, 486, art. 159 §2.

Rota (cf. c. 1445 §1, 1°), there are in fact no other recourses against Rotal decisions aside from the complaint of nullity, the *restitutio in integrum* and the new proposition of a cause when such has been denied by the Rota.¹²⁸ The so-called “recourse” against a Rotal decree of rejection of an appeal to the Signatura is no longer available to an aggrieved party. And this is reflected in the norms of the Rota issued in 1994 which insist on the unappealability of the decree of rejection, making no mention of any recourse to the Supreme Tribunal.¹²⁹

Nevertheless, as is confirmed in the jurisprudence of the Apostolic Signatura,¹³⁰ there may be some means for challenging such a decree, and this depends upon whether the matter has become a *res iudicata*. A decree of admission of an appeal opens the pathway to the judicial process, which itself is comprised of numerous opportunities for one aggrieved by the process to defend his rights; that decree makes no firm decision and so gives rise to no *res iudicata*. A decree of rejection of an appeal, however, being unappealable gives rise to a *res iudicata* in accord with the norm of canon 1641, 2° (CCEO c. 1322, 4°). It therefore could be challenged by requesting a *restitutio in integrum* against an unjust rejection.

3 — The “*Appellatio mere dilatoria*” in the Context of Canonical Tradition

As was mentioned in the introduction to this article, discovering the expression “*appellatio mere dilatoria*” in the much anticipated papal reform of the norms governing causes of nullity of marriage was a cause of some surprise, especially among canonists. This is not only because it gives the impression of restricting the right of appeal, but also because its meaning is not immediately clear. It is not at all explained in the canons where it is found, nor are there any indications of its meaning in the *ratio procedendi*. This would have fit naturally into the latter, intended as it was “to describe and, where necessary, to complete the principal innovations of the law” (*RP*

¹²⁸ Cf. Zenon GROCHOLEWSKI, “I tribunali,” in Piero Antonio BONNET and Carlo GULLO (eds.), *La Curia Romana nella Cost. Ap. “Pastor bonus,”* Studi Giuridici 21, Vatican City, Libreria Editrice Vaticana, 1990, 404-405; Antoni STANKIEWICZ, “Le impugnazioni delle decisioni rotali,” in *Le “Normae” del Tribunale della Rota Romana*, 255.

¹²⁹ *Quammaxime decet* art. 106: “Si oriatur quaestio de iure appellandi, quaestionis decisio inappellabilis Turno devolvitur proxime sequenti.”

¹³⁰ Cf. FUENTES CALERO, *Impugnabilidad*, 241-252, 413-415; MONTINI, “Alcune questioni,” 336-343; IDEM, *De iudicio contentioso ordinario*, 537.

art. 6). Why was this particularly significant innovation of law given no explanation or even any mention there?

In the face of this dubious situation for those entrusted with interpreting and applying the new law, the challenge is not minor. Normally, a key source for scrutinizing the meaning of legislative expressions is the rich patrimony of the whole canonical tradition. Unless I am mistaken, however, “*appellatio [mere] dilatoria*” is an expression found nowhere else in the history of the Church’s sacred discipline. Nevertheless, there is a similar phenomenon addressed in medieval papal legislation and treated in turn within the canonical science. In this final section, this element of canonical tradition will be explored and proposed as a hermeneutical key for understanding when an appeal is merely dilatory.

3.1 — The “*Appellatio frivola et frustratoria*”

Canonical doctrine in the era of the *Ius Decretalium* regularly identified different species of appeal, considered in terms of their substantive character.¹³¹ It distinguished an appeal that is reasonable and just, or legitimate, from one that is evasive (*frustratoria*) or calumnious (*calumniosa*) and frivolous (*frivola*).¹³² An evasive appeal is one introduced only for the purpose of delaying the resolution to the cause or for protracting litigation. A frivolous appeal is based on minimal, light, or futile arguments. In the older discipline, such appeals could be rejected at the outset and the appellant punished.

These species of illegitimate appeals were the object of some Roman imperial legislation, which ancient and venerable juridical source was in part what inspired its introduction into the canonical system. Roman procedural law, which so highly influenced the early formulation of canonical procedural law, recognized the injustice of the one who used the judicial system in order to prevent justice rather than to receive it. Thus, it was clearly an abuse for a

¹³¹ This is distinct from different kinds of appeals understood in terms of their juridical nature. Of chief importance in this regard is the judicial appeal and the so-called extrajudicial appeal, or the challenge of the merits of an act placed outside a trial (now: a singular administrative act).

¹³² Cf. Giovanni Battista de Luca VENUSINI, *Theatrum veritatis et iustitiae*, vol. 15, Venice, Apud Paulum Balleonium, 1706, 130, nn. 1 and 9; SCHMALZGRUEBER, *Jus ecclesiasticum universum*, 472, no. 5; Anaklet REIFFENSTUEL, *Jus canonicum universum complectens tractatum de regulis juris*, vol. 3, Paris, Louis Vivès, 1866, 306, no. 17; F. Lucius FERRARIS, *Bibliotheca canonica iuridica moralis theologica nec non ascetica polemica rubricistica historica*, vol. 1, Rome, Typographia Polyglotta S.C. de Propaganda Fide, 1885, 292, nn. 10-11; LEGA, *Praelectiones*, vol. 1, 613, no. 631, and 617 *sub* 4); Francis DROSTE, *Canonical Procedure in Disciplinary and Criminal Cases of Clerics. A Systematic Commentary on the “Instructio S. C. Epp. et Reg., 1880,”* New York, Benzinger Brothers, 1887, 179, note 1.

defendant to present a *libellus* or an appeal to the emperor in order to obstruct a trial.¹³³ The appeal of such a one was justly rejected. When one had confessed to and been condemned of such grave crimes as murder, adultery, fraud and poisoning, his appeal against a condemnatory sentence could be presumed to be made only to avoid punishment. Thus Constantine declared: "It is not fitting that delaying postponements and evasive appeals (*appellationes frustratoriae*) and mockeries be admitted. For just as it is not necessary that aid be denied those who appeal well, so is it not appropriate that what is carried out properly be deferred for those inane appellants against whom judgment was rightly made."¹³⁴ Constantius, too, forbade *provocationes frustratoriae* or *moratoriae* in particular matters, including "the crime of adultery" which is a "sacrilege of marriage."¹³⁵ Nevertheless, the possibility of an appeal being brought forward in order to cause delay or evade a just judgment was not meant to cause the appellate judge to strive for the avoidance of appeals as a matter of principle. Rather, the right of appeal was to be respected if the appellant had at least one probable ground for appealing.¹³⁶

Citing St. Ives of Chartres, who in turn cites the Theodosian Code and the *Sententiae* of the Roman jurist Paul, Gratian poses a question "about those who appeal for the purpose of delaying" (*de his, qui causa dilationis appellant*), and offers this text by way of solution: "Anyone who appeals not out of confidence in his just cause but for the purpose of bringing about a delay lest the decision be issued against him, or if one confessing his deeds chooses the appeal lest he be removed [from office], such appeals are not to be accepted."¹³⁷ Rufinus sought to define better this dilatory appeal in the following terms: "One evasively appeals for the purpose of delay (*causa frustratorie dilationis appellat*) who knows that he is fostering an unjust cause and therefore does not appeal in order to protect his right, which does not exist, but in order to aggrieve his opponent with litigation and expenses."¹³⁸

¹³³ See D.49.5.4.

¹³⁴ CTh.11.36.1: "Moratorias dilationes frustratoriasque non tam appellationes quam ludificationes admitti non convenit. Nam sicut bene appellantibus negari auxilium non oportet, ita his, contra quos merito iudicatum est, inaniter provocantibus differri bene gesta non decet."

¹³⁵ See CTh.11.36.10. See also 4 at *ibid.* for a similar principle. Elsewhere it is insisted that false appeals by one justly condemned were not to be entertained (cf. CTh.9.40.15). On the moral integrity of appeals in general, cf. Nov. 124.1.

¹³⁶ D.49.1.13.1: "*Ulpianus libro secundo responsorum*. Non solere improbari appellationem eorum, qui vel unam causam appellandi probabilem habuerunt."

¹³⁷ C.2.6.25: "De his, qui causa dilationis appellant. [...] Quicumque non confidentia iustae causae, sed causa afferendae morae, ne contra eum sententia proferatur, appellauerit, uel si de facto suo confessus, ne abdicator appellare uoluerit, huiusmodi appellationes non recipiantur."

¹³⁸ See Rufinus von Bologna (Magister Rufinus), *Summa decretorum*, Heinrich SINGER (ed.), Paderborn, Verlag, 1963, 253. The next century, in the context of his discussion on the cardinal

Moreover, for Gratian, a dilatory appeal was not without extrajudicial consequence. One who made an unjust appeal (*iniusta appellatio*) in order to prevent the return of what he illegitimately held merited to be punished fourfold the value of the possession.¹³⁹

As is observed in his constitution *Quum in ecclesia*, Pope Clement III (1187-1191) was disturbed by the practice of some clergy of appealing against decisions of their bishop, not because they found his decision unjust but out of indulgence for their pursuit of autonomy from the bishop and ecclesiastical discipline. Such appellants, having been rightly condemned, were seeking their own will, not the things of Jesus Christ. Thus, appeals based on such a motive, namely, avoidance of the execution of a just sentence, were to be rejected at the outset and the cause returned to the judge *a quo* for execution. For the appeal is intended by the juridical order "not as a defense of iniquity but as a refuge for the oppressed and unjustly condemned." This decretal, however, at the same time defends appeals introduced for the pursuit of justice by one afflicted with a grievance. In such a case, the correction of the prior decision is worthy of prosecution before the appellate judge.¹⁴⁰

These principles had already been applied by the papal chancery. For example, while defending the right of a suffragan to appeal to the Roman Pontiff against decisions of the metropolitan archbishop, Alexander III in a letter of May 14, 1174 (or 1176) rebuked the practice of making such an appeal in order to avoid the imposition of a just punishment and the general vigilance of the metropolitan. He declares: "Manifest offenses must not remain uncorrected through the pretext of appeal, nor must their subjects rejoice with impunity in their excesses." It would be unjust to introduce such an appeal in order "to impede the archbishop from taking cognizance of his

virtue of justice, St. Thomas AQUINAS would examine the moral liceity of appealing against the decision of a competent judge. He vindicates this right, while distinguishing the one who appeals "out of confidence in a just cause, that is, because he is unjustly aggrieved by the judge" from the one who does so "for the purpose of bringing about delay, lest a just sentence be issued against him." The last appeals unjustly, since he causes injury by his deeds, impedes the work of the judge, and disturbs his opponent. See *Summa theologiae*, II^a-II^{ae}, q. 69, a. 3.

¹³⁹ Cf. C.2.6.27. This was an application of the principle of Roman law regarding the punishment an appellant who instituted *lis mala* (cf. Cod.7.62.6.4). The Council of Trent, for its part, would in a sense institutionalize this by imposing upon the appellant the financial burden brought about by the transmission of the acts to the appellate judge (cf. COUNCIL OF TRENT, XXIV Session, "Decretum de reformatione," Caput XX, 11 November 1563, in H.J. SCHROEDER (ed.), *Canons and Decrees of the Council of Trent. Original Text with English Translation*, St. Louis, B. Herder Book Co., 1950, 480; = *Canons and Decrees of the Council of Trent*).

¹⁴⁰ Cf. X.2.28.38.

subjects' suits and excesses." For this reason, such appellants could be subject to punishment.¹⁴¹

Although it is clear in the *ius vigens* that only the judge *ad quem* may make a judgment about the admission of the appeal and not the judge *a quo*, this was not always so. Clement IV (1265-1268) declared that the judge who issued the sentence enjoyed the power to discern the quality of the appeal against it. And if he saw that it was "frivolous" (*appellatio frivola*) and that it was not made in pursuit of justice, he could reject it and refuse to transmit it to the appellate judge. Should he nevertheless transmit it, the appellate judge could rebuke the appellant, upon whom the payment of expenses would be imposed, as well as the judge *a quo*.¹⁴²

The "evasive appeal" (*appellatio frustratoria*) was an unjust provocation to a superior judge without cause in order to avoid or delay condemnation. A legal remedy to evasive appeals was the imposition of time limits for the appellant's prosecution of the cause.¹⁴³ Failure to pursue the appeal in the

¹⁴¹ See Charles DUGGAN, *Decretals and the Creation of 'New Law' in the Twelfth Century. Judges, Judgements, Equity and Law*, Variorum Collected Studies Series, Aldershot, Ashgate, 1998, II/128-129 (no. 42) (= DUGGAN, *Decretals*). For a treatment focused on the appeal from the same period, see Antonio Padoa SCHIOPPA, "I limiti all'appello nelle decretali di Alessandro III," in Stanley CHODOROW (ed.), *Proceedings of the Eighth International Congress of Medieval Canon Law, San Diego, University of California at La Jolla, 21-27 August 1988*, Monumenta Iuris Canonici, Series C: Subsidia, Vatican City, Biblioteca Apostolica Vaticana, 1992, 387-406.

¹⁴² VI.2.15.5: "Quum *appellationibus frivolis* nec iustitia deferat ..." In a similar vein, later doctrine would propose that, upon transmitting the cause to the judge *ad quem*, the judge *a quo* could indicate "whether the appeal seems just and legitimate to him" or whether it seemed frivolous or evasive (see LEGA, *Praelectiones*, 625, no. 641).

For mention of the rejection of an *appellatio frivola manifeste*, see Clem.2.4.1; the context was that an otherwise absent party who tried to appeal before issuance of the definitive sentence who then withdrew his absence could still appeal after the issuance of the definitive sentence "unless his first appeal was manifestly frivolous."

The problem of frivolous appeals was addressed even by an ecumenical council, namely, the Council of Trent, but it limited its attention to interlocutory recourses of different kinds. In its thirteen session, it prohibited an accused subject, whose condemnation seemed imminent, from challenging a provision of a bishop within a criminal trial prior to a condemnatory definitive sentence, "neque episcopus seu vicarius *appellationi* huiusmodi tamquam *frivolae* deferre teneatur" (COUNCIL OF TRENT, XIII Session, "Decretum de reformatione," Caput I, 11 October 1551, in *Canons and Decrees of the Council of Trent*, 357-358, emphasis added). Moreover, it stated a general principle according to which a sentence could not be appealed unless it was a definitive sentence or had the force of a definitive sentence (IDEM, XXIV Session, "Decretum de reformatione," Caput XX, in *ibid.*, 479-480). These norms would be reinforced subsequently. See, e.g., BENEDICT XIV, constitution *Ad militantis*, 30 March 1742, in *Codicis iuris canonici fontes*, vol. 1, 723-733.

¹⁴³ Cf. DUGGAN, *Decretals*, III, 114 and 141 (no. 874), 145 (no. 1009); V, 15.

allotted time would result in the frustration of the attempted evasive appeal. The judge was to be vigilant against abuses of the right of appeal. In the context of a reply concerning unappealable sentences, Innocent III (1198-1216) makes passing reference to the “*appellatio frustratoria*,” urging ministers of justice never to allow some ecclesiastical affair to be impeded by such an appeal.¹⁴⁴ As a later piece of procedural legislation would suggest, an appeal could also be seen to be merely dilatory or evasive in retrospect while the appellate trial is pending. Such could be verified when the appellant conducts himself during the trial in an obstructionistic manner in order to prevent confirmation of the unfavorable sentence.¹⁴⁵ This could indicate that the entire appeal had evasive motives.

Papal concern about evasive and frivolous appeals would not be reflected in bodies of procedural law subsequent to the era of the decretals. On the contrary, one reform of monumental importance and (until recently) perduring force was one in which the multiplication of appeals was not only not discouraged but also positively promoted. That is, the celebrated constitution *Dei miseratione* of Benedict XIV discussed briefly above established the stable and universally compulsory office of defender of the bond (called by him the *Defensor Matrimoniorum* or *Matrimonii*).¹⁴⁶ It was the intention of Pope Lambertini that that public official, in addition to protecting the bond throughout the course of the trial, would ensure that no marriage would be declared definitively null without the introduction of at least one appeal by said defender and a double conformity of sentences (cf. §8). For he was distressed by the fact that the private interests and whims of the spouses could result in an unjust declaration of nullity of marriage, when both spouses at least ultimately favored such a declaration, while “there is none to introduce an appeal to the superior judge” (§3). Such, in his judgment, was an affront to the dignity of marriage and the stability and health of society. The figure of the defender of marriage, then, would ensure such an appeal. The same defender, moreover, enjoyed the right to appeal even against a double conformity of sentences *pro nullitate* when, “*salva conscientia*,” he could not acquiesce to the declaration of nullity of the marriage (§11).

¹⁴⁴ See X.2.28.53.

¹⁴⁵ Cf. SACRED CONGREGATION OF BISHOPS AND REGULARS, decree *Non ita pridem*, 18 December 1835, in *Codicis iuris canonici fontes*, vol. 4, 867, no. 6: “... si appellationis acta negligenter aut malitiose protrahantur ...”

¹⁴⁶ BENEDICT XIV, constitution *Dei miseratione*, 3 November 1741, in *Codicis iuris canonici fontes*, vol. 1, 695-701. For some aspects of these duties and faculties of the defender of the bond, see Pio CIPROTTI, “Quaestiones de appellatione et peremptione in causis matrimonialibus,” in *Ap*, 12 (1939), 115-123; Francesco ROBERTI, “De appellatione defensoris vinculi in causis matrimonialibus,” in *Ap*, 2 (1929), 516-518.

Subsequent bodies of procedural law, too, made no mention of the *appellatio frustratoria et frivola*. Rather, their emphasis was more on the plain right of appeal of the one against whose juridical interests the sentence in a case was issued.¹⁴⁷ There was, however, some jurisprudence that treated such appeals. Two decisions in particular are relevant to our discussion.

1. The merit of one appeal was treated directly in a cause *Romana* decided by the Roman Rota in 1910, concerning the privileged forum of clerics, that is, the right of clerics not to be sued before a civil judge but only to be summoned by an ecclesiastical judge. The cleric-respondent in the case was sued before the competent ecclesiastical tribunal by a layman who claimed a certain amount of money from the cleric's inheritance from the bishop whom the layman used to counsel in temporal affairs. In order to hinder the trial, the cleric attempted to renounce the privileged forum. This was eventually rejected by the tribunal, but the cleric appealed to the Sacred Roman Rota. The Rota, affirming that clerics do not have the right to renounce the privileged forum, declared:

Although one can indeed, *generally* speaking, appeal from any sentence, since the appeal is a kind of defense not lightly to be denied anyone, it is nevertheless sometimes prohibited by law. This is especially so in those cases in which the remedy of appeal, being an institute not for the defense of iniquity but for the aid of justice, falls to the detriment of justice and innocence (...). In general, an appeal which seems openly frivolous and evasive (*frivola et frustratoria*) is not admitted (...). Such is an appeal from a sentence issued in notorious causes, whether by notoriety of fact when what is alleged in the trial cannot be hidden by any evasion, or by notoriety of law when the cause was decided according to the clear words of the law. For in this case, an appeal assails the law rather than the sentence issued by the judge, and it is carried out to the detriment of justice, inasmuch as it is frivolous and evasive (...).¹⁴⁸

¹⁴⁷ Cf., e.g., SACRED CONGREGATION OF BISHOPS AND REGULARS, instruction *Sacra haec*, 11 June 1880, in *Codicis iuris canonici fontes*, vol. 4, 1024-1025; SACRED CONGREGATION OF THE HOLY OFFICE, instruction *Quemadmodum matrimonii foedus*, 1883, in *ibid.*, 395-411; SACRED CONGREGATION FOR THE PROPAGATION OF THE FAITH, instruction *Cum magnopere*, 1883: in *ibid.*, vol. 7, 479-492; SECRETARY OF STATE, *Lex propria Sacrae Romanae Rotae et Signaturae Apostolicae de mandato speciali SS.mi*, 29 June 1908, in AAS, 1 (1909), 20-35.

¹⁴⁸ See Sentence c. PERSIANI, *Romana, Privilegii fori*, Decisio XI, 15 March 1910, in *RRT Dec.*, 2 (1910), 111, no. 10. The dispositive part of the sentence established that "appellationem interpositam a [Rev.mo D.no Convento] in casu utpote *iuris fulcimento destitutam*, immo ab ipso iure improbatam, esse reiiciendam sicut de facto reiicimus" (*ibid.*, 112, no. 11, emphasis added). This sentence was also published in AAS, 2 (1910), 492-497.

2. The decision from a much earlier controversy, decided in 1869, was frequently cited by authors as an example of a frivolous and evasive appeal, but its principal disposition could be reduced to the introduction of an appeal outside the peremptory time limits, and only secondarily concerning the merits of the cause. It was a case of a deprivation of a clerical benefice from a priest, who not only resided nowhere near the seat of the benefice (viz., a particular altar in a cathedral church) but had also ceased wearing clerical attire and tonsure. After everything required by law had been observed, the competent bishop deprived him of the benefice by sentence. Whereas the peremptory time limit for appealing was ten days, he introduced the appeal over two months after the sentence had been handed down at a session before the bishop, from which he was willfully absent; and he prosecuted the appeal before the Holy See about two months after that. The competent dicastery rejected the appeal in the first place because the matter had become a *res iudicata* due to the passage of the peremptory time limits; in addition, the decision noted (in so many words) that the appeal lacked any foundation, since the bishop was clearly observing the norm of law.¹⁴⁹ However, while it may have been a merely evasive appeal by a contumacious derelict, it is not evident from the decision that the appeal would have been rejected *in limine* on substantive grounds.

As has been implied above *passim*, there is no trace in the 1917 code of this ancient concern with evasive and frivolous appeals. It did however surface during the preparation of that body of law. Among the requests expressed by the consulted bishops of the Church as regards the procedural law to be

This is the most direct treatment of such an appeal, though it is mentioned elsewhere in Rotal jurisprudence in reference to incidental questions. For application of the expression “frivola et frust[r]atoria” to an exception, see *Sententia c. FLORCZAK, Incidentis super contumacia*, Dec. XXI, 24 July 1923, in *RRT Dec*, 15 (1923), 181, no. 1. The limitation of recourses to definitive sentences and acts having the force of a definitive sentence is prescribed “ad obtruncandas frivolas appellationes” (*Sententia c. MORI, Remotionis et poenarum*, Dec. XXII, 17 April 1913, in *RRT Dec*, 5 (1913), 252, no. 2), *appellatio* here, of course, being used in a broad sense. Indeed, the norm of canon 1618 of the 1983 code, taken together with canon 1629, 4°, helps to limit appeals by better defining acts that have the force of a definitive sentence. On this point we read: “Itaque expresse nova lex perfugium caludit *appellationibus frivolis, seu inanibus, futilibus rationibus fundatis*. Cum autem aequivocam interpretationem eadem non patiatur, *frustratorias, sive moratorias provocationes* admitti prohibet” (Decree *c. MASALA, S. Severi, Nullitatis matrimonii; Iuris appellandi*, 27 March 1984, in *RRT Decr*, 2 (1984), 47, no. 7, emphases added). For the multiplication of such “appeals” gives occasion to obstructionistic parties “qui appellationum diffugio cursum iustitiae impediabant” (Interlocutory Sentence *c. JULLIEN, Mediolanen., Nullitatis matrimonii; Incidentis de suppletiva probatione admittenda*, Dec. VIII, 17 February 1930, in *RRT Dec*, 22 (1930), 81, no. 6).

¹⁴⁹ Cf. SACRED CONGREGATION FOR THE COUNCIL, *Beneficii*, 23 January 1869, in *Acta Sanctae Sedis*, 4 (1868), 378-383.

codified—collected in a document of 1905 called the “*postulata Episcoporum*”—the *vota* of the Chilean and Sardinian bishops proposed that the institute of the appeal be circumscribed in such a way that costs, frequency, and delays are reduced or avoided.¹⁵⁰ More to the point, the Spanish bishops sought the prohibition of “futile and evasive” appeals (*futiles et frustratoriae appellationes*), while on the other hand proposing that the unjust denial of an appeal justified a complaint of nullity.¹⁵¹

The subject was also included in some of the proposals of the experts in their draft canons. The 1907 *votum* of Otto Fischer advanced the principle that the appellate judge could reject an appeal if he could see that it was not just or that the appealed sentence was null.¹⁵² The 1908 *votum* of Joseph Noval suggested that the right of appeal be denied by law in causes of minor importance, including when only a small amount was awarded to the victor. While he did not explicitly mention frivolous appeals, he envisioned that there would be no appeal when the justice of the dispositive part of the sentence was guaranteed by a decisive oath or a judicial confession. He also thought the right of appeal should be denied the obstinately contumacious and a condemned party who had already accepted the decision. Finally, he thought the appellate judge should reject an appeal in which “legitimate causes for appealing” were not expressed.¹⁵³ The 1908 *votum* of Serafino Many had many of the same elements; he also added that an appeal to the Roman Rota could be rejected if “something were openly lacking for a legitimate appeal.”¹⁵⁴

In the first schema, dated 1909, provision was made for what the tradition called an *appellatio frivola et frustratoria*. In Part II on the judicial process in general (*De processu iudiciario in generali*), in Title XX, we read:

Can. 16 [474]. The appellate judge is bound as soon as possible either to admit the cause or by his decree to reject the appeal as frivolous, futile or vexatious.

Can. 17 [475]. §1. An appeal is to be considered frivolous, futile or vexatious, 1° whenever it is based on no probable argument or document and, after some brief time limit has been set, the party is unable to bring forward anything stronger; 2° in causes of mere private rights, which the judge in his prudent

¹⁵⁰ Cf. Joaquín LLOBELL, Enrique DE LEÓN and Jesús NAVARRETE, *Il libro “De processibus” nella codificazione del 1917. Studi e documenti. Vol. I: Cenni storici sulla codificazione “De iudiciis in genere,” il processo contenzioso ordinario e sommario, il processo di nullità del matrimonio*, Monografie Giuridiche 15, Milan, Giuffrè Editore, 1999, 362 and 366, nn. 44 and 85.

¹⁵¹ *Ibid.*, 366, nn. 82-83. Number 82 reads: “In omni casu proscribendi penitus quicumque recursus futiles atque frustratorii, sicut et quaelibet huiusmodi appellationes.”

¹⁵² *Ibid.*, 564, §11 [100].

¹⁵³ *Ibid.*, 600-601 and 602, cann. 244-245 [246-247], 259 [260] §1.

¹⁵⁴ *Ibid.*, 650, 652-653 and 657, cann. 193, 205 §§1-2 and 227 §2.

judgment deems to be of minimal importance, whenever it is apparent that the appealed sentence is not evidently unjust. §2. There is no remedy of law against the decree of the judge that rejects the appeal, except a complaint of nullity.¹⁵⁵

With very minor alterations, these draft canons would remain in the next four schemata, entitled A (1910-1911), B (1912-1913), C (1913-1914) and D (1914), until an objection was raised against them by János Cardinal Csernoch, the Archbishop of Esztergom (*Strigonensis*)—now Esztergom-Budapest. His 1915 observations proposed the elimination of any faculty on the part of the superior judge to evaluate the substantive foundation of the appeal. He suggested that the first canon be replaced with this: “The appellate judge is bound to issue a definitive sentence by reviewing the appealed cause as soon as possible. If he should find an omission or defect in the process handled before the local tribunal, he will remit the acts to the judge *a quo* and order their completion.” And regarding the second canon, he observes: “This canon is to be omitted. For by not admitting an appeal, the judge already issues a sentence on the merits of the case, which cannot be done before a substantive treatment of the cause.”¹⁵⁶ These proposals were admitted by the code commission, and any mention of a frivolous, futile or vexatious appeal was eliminated from the subsequent schemata E (1915-1916) and F (1916).

Accordingly, these draft canons are found nowhere in the promulgated text of the 1917 code. The only thing related to a frivolous or evasive judicial appeal in the 1917 code is the lack of right of appeal by one who had previously agreed that the controversy could be resolved via oath

¹⁵⁵ Ibid., 833: “Can. 16 [474]. Iudex appellationis tenetur quamprimum aut causam admittere, aut appellationem ipsam qua frivolum, futilem aut vexatoriam decreto suo reiicere. Can. 17 [475]. § 1. Frivola, inutilis et vexatoria aestimanda est appellatio, 1^o. quoties nullo probabili argumento aut documento innitatur, e praefixo aliquo brevi termino, nil validius pars valeat afferre; 2^o in causis iuris meri privati, quas pro suo prudenti iudicio minimi momenti iudex censeat quoties sententia appellata non appareat evidenter iniusta. § 2. Contra iudicis decretum appellationis reiiciens nullum datur iuris remedium, nisi querela nullitatis.”

¹⁵⁶ These unpublished texts from the Vatican Secret Archives, graciously shared with me by the first here-named author, are destined to be published in the following publication: Joaquín LLOBELL, Serena MIRALDI and Paolo ZUNINO, *Il libro “De processibus” nella codificazione del 1917. Gli schemi completi, le “Animadversiones Episcoporum” ed indici generali*, vol. 3, Milan, Giuffrè Editore, unpublished. The canon numbers evolved, as usually happens, such that by 1914 they had become, respectively, 406 and 407. The cardinal’s Latin observations on these canons read: “Can. 406. Canone hoc delecto ponatur sequens: ‘Iudex appellationis tenetur quamprimum causam appellatam revidendo sententiam definitivam ferre. Si in processu coram tribunali pedaneo pertractato hiatus aut defectus invenerit, acta remittet ad iudicem a quo earumque completionem jubebit.’ Can. 407. Canon iste praetermittatur. Nam non admittendo appellationem iudex jam in merito fert sententiam, quod fieri nequit ante causae meritoriam pertractationem.”

(*iusiurandum decisorium*), which the appellant had freely sworn prior to or during the trial.¹⁵⁷ That institute, however, evidently had minimal application.

Certain commentators on that code, who were not chiefly proceduralists or the principal authorities in procedural law, do not treat such a class of appeal in detail but mention it only in passing in imitation of the previous century's doctrine.¹⁵⁸ Those who do treat it in any depth express noted caution about the rejection of an appeal on the basis of its being evasive or frivolous. Wernz, for instance, after summarizing the classical doctrine, writes: "Nevertheless, in practice it is very difficult and dangerous not to defer an appeal introduced in a legitimate manner *to the superior judge* under the pretext that it is *frivolous*," namely, an appeal against a definitive sentence.¹⁵⁹ And citing Wernz, an American canonist writing in 1932 declared:

[E]cclesiastical legislation affords great latitude in this matter to those who consider the sentence pronounced on their case as unjust. In practice, it is frequently difficult to distinguish between the just or unjust, legitimate or frivolous reasons upon which an appeal is based and, consequently, it would be a dangerous course for a judge to pursue, if he were to reject indiscriminately as unjust, appeals that were otherwise made legitimately and in accordance with the due forms of law.¹⁶⁰

Lega and Bartoccetti, for their part, mention the *appellatio frustratoria* and the *appellatio frivola*, but their understanding had developed from its medieval sense. *Appellatio frustratoria* has a much more nuanced sense than what the other authors were discussing. It is situated within a discussion about whether the grievance has *been* inflicted or is *going* to be inflicted in the future; the former occurred when an unfavorable definitive sentence was issued, while the latter may occur when an unfavorable interlocutory sentence

¹⁵⁷ Cf. 1917 *CIC* cann. 1834-1835, 1880, 5°.

¹⁵⁸ See, e.g., Udalricus BESTE, *Introductio in Codicem*, Collegeville, MN, St. John's Abbey Press, 1938, 817; Felice CAPPELLO, *Summa iuris canonici*, 2nd ed., vol. 3, Rome, Universitas Gregoriana, 1940, 215, no. 259.2; Guido COCCHI, *Commentarium in Codicem iuris canonici*, vol. 4, Turin, Marietti, 1930, 371, no. 224.3; Matteo Conte a CORONATA, *Institutiones iuris canonici*, 4th ed., vol. 3, Turin, Marietti, 1956, 367; Juan B. FERRERES, *Institutiones canónicas*, 5th ed., vol. 2, Barcelona, Editorial Pontificia Puertaferri, 1934, 380-381, no. 799; José GALABUIG REVERT, *Procedimientos judiciales eclesiásticos*, vol. 1, Madrid, Librería general de Victoriano Suárez, 1923, 324, no. 8a) and 342, nn. 1-2; Francesco M. MARCHESI, *Summula iuris canonici*, vol. 3, Alba: Editiones Paulinae, 1953, 194, no. 111; A. VERMEERSCH and J. CREUSEN, *Epitome iuris canonici*, vol. 3, Rome, H. Dessain, 1928, 98, no. 237.

¹⁵⁹ See Petrus WERNZ and Petrus VIDAL, *Ius canonicum*, vol. 6, Rome, Universitas Gregoriana, 1927, 550-551, note 11.

¹⁶⁰ CONNOLLY, *Appeals*, 71.

is issued during the trial which could lead to a future unfavorable definitive sentence at its conclusion. It is an appeal against such a foreseen grievance that is *frustratoria seu irrationalis*.¹⁶¹ In these illustrious authors' general treatment on the institute of appeal, they do not envision the frivolous or evasive appeal against a definitive sentence as one worth mentioning. And in fact, they in another context reject the notion that the judge *a quo* could refuse to transmit the cause to the appellate tribunal when the appeal was frivolous (*frivola*), as was prescribed by the above-cited decretal of Clement IV.¹⁶² Lega declares:

I am of the opinion that [the norm of that decretal] is not in force, since in canon 1880, where situations in which there is no place for an appeal are listed, there is no mention of the frivolous appeal. In addition, we observe that the canon has not a broad but a strict interpretation. Moreover, those things which are established concerning the *libellus* introducing litigation cannot be applied to the *libellus* introducing an appeal.

He continues by noting that the authors recognized that an appellant whose appeal was rejected by the judge *a quo* as frivolous still enjoyed the right to insist on the transmission of the appeal. In the interest of procedural economy which aids in avoiding circular paths like this, which themselves cause delay, the frivolous appeal was not included in canon 1880. The means of curbing abuses of the right of appeal is the passage of a controversy into a *res iudicata* after two conforming sentences, instead of the three as in the prior law, as well as the imposition of expenses upon one who stirs up and prolongs litigation needlessly.¹⁶³

Goyeneche follows Lega when he writes: "Except for the situations in which there is no appeal," namely, those listed in canon 1880, "the judge is bound to accept or admit a legitimately introduced appeal." After asserting that the same decretal of Clement IV "is a rule no longer in force," he states: "No longer is rejection of an appeal left to the will of the judge when it seems to him to be frivolous and evasive" (*frivola et frustratoria*).¹⁶⁴

¹⁶¹ Cf. LEGA-BARTOCETTI, *Commentarius*, vol. 2, 973-974, no. 1.

¹⁶² VI.2.15.5.

¹⁶³ Cf. LEGA-BARTOCETTI, *Commentarius*, vol. 2, 989-990, no. 9.

¹⁶⁴ See his *De processibus. Breves annotationes ad L. IV Codicis iuris canonici*, Rome, Poliglotta "Cuore di Maria," 1947, 172, no. 123 *sub* I.

ROBERTI makes no mention of these kinds of appeal in his classic above-cited manual, so one may presume that he did not see them as having perduring importance. CAPPELLO, even while mentioning the frivolous and evasive appeal, insists that a properly prepared and valid appeal must be admitted by the judge, thus preventing execution (cf. his *Summa iuris canonici*, vol. 3, 217, no. 261.2).

3.2 — Interlocutory Synthesis of Contributions of the Canonical Tradition

To summarize, we can see that canonical tradition recognizes the injustice of an appeal that is evasive and frivolous. An appeal may be *evasive* when it is proposed by the appellant in order to obstruct an unfavorable decision. This may be a matter of delaying a clearly justified condemnation or, more generally, of delaying the consequences of the execution of the sentence. Such an appeal is made with a *dilatory motive*. An appeal may be *frivolous* when it is made not out of any concern for what is just in the controversy or whether the definitive sentence issued is just. Such an appeal serves only to foster an unjust cause, defend iniquity, grieve the other party, and avoid subjection to the law and authority. There is a certain presumption that a frivolous appeal is made, if not out of ignorance, out of malice.

Canon 475 §1, 1° of the 1909 schema to book IV of the 1917 code is a useful point of reference, since it sets aside the motives of the appellant (whether notorious or hidden) and offers a concise and objective concept of the frivolous appeal, which may or may not be made out of evasion. Once again, it stated that such an appeal is “based on no probable argument or document,” and does not become “stronger” even after the appellant has had the opportunity to augment it.

The 1910 Rotal decision in the cause *Romana* offers its own insight. An appeal is frivolous when it lacks foundation *of law*; and this is verified when the challenged sentence was issued clearly in accord with the norm of substantive law. And an appeal is evasive when it lacks foundation *in the facts*; and this is verified when the challenged sentence was clearly issued in accord with the real truth of the case. In that controversy, the priest-respondent was evidently acting unjustly and certainly had no right to renounce the privileged forum of the Church. And so his appeal was frivolous and evasive.

All of this being said, there is a consistent concern for the solicitous respect for the right of appeal. No hasty conclusions are to be made about the evasive or frivolous character of an appeal, since this is such a grave right.¹⁶⁵ Likewise, Cardinal Csernoch’s 1915 observations proved to be persuasive, namely, the concern that there not be a *iudicium ante iudicium*. If an appeal is substantively baseless, this should be explored during the appellate trial and declared in the sentence of the tribunal of appeal. This thinking prevailed in the 1917 code without dispute and in the doctrine of the proven authors of procedural law.

¹⁶⁵ Cf. D.49.1.13.1, X.2.28.38.

Due to the prevalence of the *favor matrimonii* in the Church, it is uncertain that causes of nullity of marriage were included among those in which the judiciary could truly fall victim to evasive and frivolous appeals. It can be presumed, however, that these were considered somewhat exempt from this preoccupation. For none of the cited examples from the decretals or the more recent jurisprudence concerned marriage; they treated only matters of penal law or discipline of the clergy. Moreover, it cannot be ignored that the one exception and even counter-example to this whole concern of the papal legislator was one in which appeals were to be *multiplied, particularly in causes of nullity of marriage*, for the greater protection of the sanctity of marriage and of the Christian family. Nevertheless, the reforms of 2015 seem to have reversed this thinking, instituting rather a mitigation of the procedural protections of marriage.

3.3 — The “*Appellatio mere dilatoria*”

The concept of the “*appellatio mere dilatoria*” appears in four canons, namely, in two almost identical norms parallel to one another in both codes: canons 1680 §2 and 1687 §4 of the *CIC* and canons 1366 §2 and 1373 §4 of the *CCEO*. This denomination can characterize an appeal made in the ordinary process and the abbreviated matrimonial process before the bishop, but it is not explicitly envisioned in the documentary process (cf. *CIC* c. 1690, *CCEO* c. 1376). The cited canons read (emphases added):

**Canon 1680 §2 of the *CIC* and Canon 1366 §2 of the *CCEO*
(ordinary process)**

Terminis iure statutis ad appellationem eiusque prosecutionem elapsis atque actis iudicialibus a tribunali superioris instantiae [<i>CCEO</i> : gradus] receptis, constituitur collegium iudicum, designetur vinculi defensor et partes moneantur ut animadversiones, intra terminum praestitutum, proponant; quo termino transacto, <i>si appellatio mere dilatoria evidenter appareat</i> , tribunal collegiale, suo decreto, sententiam prioris instantiae [<i>CCEO</i> : gradus] confirmet.	Once the time limits established by law for appeal and its prosecution have lapsed and the judicial acts have been received by the tribunal of the higher instance [<i>CCEO</i> : level], a college of judges is to be constituted, the defender of the bond is to be designated, and the parties are to be notified that they may propose observations within the time limit allotted; when this time limit has passed, <i>if it is evidently apparent that the appeal is merely dilatory</i> , the collegial tribunal by its decree is to confirm the sentence of the previous instance [<i>CCEO</i> : level].
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**Canon 1687 §4 of the *CIC* and Canon 1373 §4 of the *CCEO*
(abbreviated process)**

<i>Si appellatio mere dilatoria evidenter appareat</i> , Metropolita vel Episcopus de quo in § 3, vel Decanus Rotae Romanae, eam a limine decreto suo reiciat; si autem admissa fuerit, causa ad ordinarium tramitem in altero gradu remittatur.	<i>If it is evidently apparent that the appeal is merely dilatory</i> , the Metropolitan or the Bishop mentioned in §3 or the Dean of the Roman Rota is to reject it at the outset by his decree; if however it has been admitted, the cause is to be remitted to the ordinary process at the second level.
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The context of the cited canons 1680 §2 and 1366 §2 is the ordinary process, and falls under the “Article” (*CIC*) or section (*CCEO*) number 4, roughly entitled, “The Sentence, Challenges against It, and Its Execution” (“*De sententia, de eiusdem impugnationibus et executione*”). While this heading gives the impression of generically referring to any sentence, whether affirmative or negative, careful reflection on the text taken in its context (*CIC* c. 17, *CCEO* c. 1499) reveals that the norm envisioning the merely dilatory appeal, like all the norms contained in the cited section, pertains only to affirmative decisions, that is, those declaring the nullity of marriage.¹⁶⁶ Indeed, canon 1679 (*CCEO* c. 1365) defines the executable sentence (*sententia executiva*) as one “which has first declared the nullity of marriage,” considering that a negative sentence does not need any execution since it merely yields to what is favored by the law,¹⁶⁷ which was already the *status quo* prior to the trial. Paragraph 1 of canon 1680 (*CCEO* c. 1366) indicates that it is treating an “appeal against the same sentence” (“*appellationem contra eandem sententiam*”). The next canon on the new proposition of a cause applies only to an executable sentence (it begins: “*Si sententia executiva prolata sit ...*”), as does the last canon of the section, quite obviously, inasmuch as it addresses the imposition of a *vetitum* and the registration of the declaration of nullity of the marriage (*CIC* cc. 1681-1682, *CCEO* cc. 1367-1368).

Moreover, beyond this textual evidence, the nature of the matter suggests the same. It is not easy to understand how an appeal against a negative sentence could in any way be merely dilatory. What would such an appeal delay? The sentence, as was noted, does not need to be executed, since it merely yields to the already extant presumption of law. A new marriage is out of the question, since the spouses are still bound to one another. It could delay the introduction of a new process, but the practice of introducing a new

¹⁶⁶ Cf. MONTINI, “VI. Dopo la decisione giudiziale,” 111, 114.

¹⁶⁷ Cf. *CIC* c. 1608 §4, *CCEO* c. 1291 §4, *DC* art. 247 §5.

libellus as a personal response to an unfavorable decision is *praeter ordinem iudicarium*. The ordinary response in such a case is an appeal which, like the *libellus* itself, constitutes an exercise of the right to seek a declaration about one's status in the Church. On the contrary, it is only an appeal against an affirmative sentence that could be merely dilatory, since it clearly delays the execution of the sentence and an anticipated marriage, and it prolongs litigation about something possibly already given a just executable judgment.

As regards the abbreviated process, it is immediately clear that the merely dilatory appeal is one that would only be made against an affirmative sentence. For only an affirmative sentence may be issued (and therefore challenged) within that process as such (cf. §§1 and 3 of *CIC* c. 1687 and *CCEO* c. 1373). Nor is there any appeal against the decree by which the bishop remits the cause to the ordinary process, since it lacks the force of a definitive sentence.¹⁶⁸

One component of the novelty of the expression "*appellatio mere dilatoria*" is the use of the term "*dilatoria*" (dilatory, delaying, deferring). While the concept of "delay" is not unfamiliar, it is immediately plain to the proceduralist that the term *dilatio* in the judicial context refers not to an unfortunate protraction of time before litigation is ended—a waiting period (*mora*)—but, more neutrally, to the passage of time within the judicial process. *Dilatio* can be defined as "an interval of time granted to the parties to place a procedural act."¹⁶⁹ It is used in law in reference to dilatory exceptions, which is a procedural act by which a party proposes an objection within a trial, typically prior to the formulation of the doubt. It is "dilatory" not in the sense of being a delay-tactic (though it could be used in that way). Rather it is a means for defending one's right over the contested object of the trial before the trial progresses, "allow[ing] the one who places it momentarily to paralyze the development of the [judicial] action which has been presented against him." Exceptions are rightly called "merely dilatory" when they are not peremptory—that is, when they would not bring an end to the trial or redound to the nullity of the sentence but only raise a matter that must be resolved before the trial may proceed.¹⁷⁰

¹⁶⁸ Cf. *CIC* cc. 1618 and 1629, 4°; *CCEO* cc. 1301 and 1310, 4°; *DC* artt. 262 and 280 §1, 4°.

¹⁶⁹ See Rosa María RAMÍREZ NAVALÓN, "Dilaciones," in *DGDC*, vol. 3, 324, citing Marcelino Cabreros de Anta.

¹⁷⁰ See José Luis LÓPEZ ZUBILLAGA, "Dilatorias [excepciones]," in *DGDC*, vol. 3, 328. Cf. *CIC* cc. 1459, 1562; *CCEO* cc. 1118, 1121; Francesco ROBERTI, *De processibus*, vol. 1, Rome, Pontificium Institutum Utriusque Iuris, 1941, 461-468, 728-733.

In his treatment of canon 1631, MONTINI envisions the possible rejection of an exception of illegitimacy of an appeal that is raised out of an "obstructionism that has an exclusively dilatory purpose (*fine esclusivamente dilatorio*)" (see his "Alcune questioni," 316, *sub* no. 2).

The expression “merely dilatory appeal” therefore does not refer to *dilatatio* in this technical sense. It is not that the merely dilatory appeal creates an interval of time within which one may place a procedural act. A procedural act has already been placed: the appeal. Herein lies the importance of the adverb “*mere*”: the appeal is *merely* dilatory in that it does not create a right to act within an interval of time but *merely causes a delay*, in the common understanding of the word (*viz.*, *mora*, not *dilatatio*).

In this connection, one may observe that an *appellatio dilatoria* is not to be confused with a *dilatatio appellatoria*, which refers to the interval of time (*dilatatio*) within which one may appeal—the period created by the law itself when there is a *delay* in the execution of the sentence.¹⁷¹ It is not that the delay is being caused out of obstruction for the execution of the sentence. Rather, there is an appropriate period of time for appealing conceded by the legislator, within which it is just that the execution be briefly postponed. The merely dilatory appeal, however, is placed within this *dilatatio appellatoria*. It is merely dilatory in that it creates new delays.

Returning to this common understand of delay (*mora*), anyone can see that every appeal is dilatory, since it delays the passage of the object of the trial into a *res quasi-iudicata* or *res iudicata*.¹⁷² The question pertains to when an appeal is *merely* dilatory—that is, when it not only causes delay but *only* causes delay and does not contribute to the discovery of the truth, the administration of justice and the defense of rights.

In her extensive critical examination of the whole procedural reform enacted by Pope Francis, Professor Geraldina Boni draws attention to the diverse exegesis of the expression “*appellatio mere dilatoria*” among certain authors.¹⁷³ She demonstrates that several canonists,¹⁷⁴ including Paolo Moneta—a leading writer in the matter of the canonical appeal (*vide supra*) and a member of the special commission that drafted the new canons—understand

¹⁷¹ Cf. Agostino PUGLIESE, “*Dilatatio*,” in Pietro PALAZZINI (ed.), *Dictionarium morale et canonicum*, vol. 2, Rome, Catholic Book Agency, 1962, 89-90.

¹⁷² “*Appellatio est modus ordinarius quo impetitur sententia ne fiat res iudicata*” (LEGA-BARTOCCELLI, *Commentarius*, vol. 2, 967, no. 1). See also Rafael RODRÍGUEZ-OCAÑA, “*Mitis Iudex*: Fuero competente y sistema de apelaciones,” in *IC*, 56 (2016), 118 (= RODRÍGUEZ-OCAÑA, “*Mitis Iudex*: Fuero competente y sistema de apelaciones”).

¹⁷³ Cf. BONI, “La recente riforma ... (parte seconda),” 58-63 and, under the same title (but “parte terza”) and in the same electronic publication (2016-11), 44-46.

¹⁷⁴ She cites, e.g., Moneta, Zambon, Ferrante, Bueno Salinas and Rodríguez Chacón. See also John P. BEAL, “*Mitis Iudex* Canons 1671-1682, 1688-1691: A Commentary,” in *Jur*, 75 (2015), 510-511; DANIEL, “An Analysis,” 455-456; Thomas J. GREEN, “*Mitis et misericors Iesus*. Some Initial Reflections,” in *Eastern Legal Thought*, 12 (2016), 135; RODRÍGUEZ-OCAÑA, “*Mitis Iudex*: Fuero competente y sistema de apelaciones,” *passim*.

it to refer to an appeal made by the respondent with the purpose of preventing or at least delaying the definitive conclusion of the trial apart from any real substantive concern about the truth of the alleged nullity of marriage. The common conviction of the authors is that a determination about such motives of the respondent should be made with great prudence and caution, lest the appellate judge injure the appellant's right of defense. This concern about respondents employing delay tactics is not something new among canonists. An American canonist writing in the 1980s bemoaned the problem of "the vindictive respondent whose only wish is to delay the case." For "some respondents, although totally disinterested in the outcome of the case as such, nevertheless wish, out of spite, to prevent the petitioner from marrying in the Church or returning to the sacraments."¹⁷⁵ Also, doctrine had considered that this was one benefit to the old *processus brevior* of canon 1682 of the *CIC*, which allowed for an immediate judgment about the justice of an affirmative sentence and the rejection of a possibly evasive or frivolous appeal of a respondent.¹⁷⁶

Boni shows that other canonists (e.g., Llobell, Bianchi) thought that an appeal was merely dilatory when there was a clear lack of *fumus boni iuris* perceptible at the time of the prosecution of the appeal or, to put it more positively, that the appellate judge was morally certain of nullity of the marriage at that time.¹⁷⁷ Boni herself finds the expression unclear because, for her, it would be typical to speak of an appeal being manifestly inadmissible or lacking in basis (e.g., when a sentence cannot be appealed or when the time limits have expired), while discerning the possibly hidden motives of the respondent is not always possible. On the other hand, she recognizes that recent years have witnessed the introduction into Italian civil procedure of the right of a judge to make a decision about the substantive basis for an appeal *in limine litis*.

¹⁷⁵ Lawrence G. WRENN, *Procedures*, Washington, D.C., CLSA, 1987, 29. In a similar sense, one Rotal decree refers to the challenge of a decision "per implacabile adversi compartis odium" (decree c. CANESTRI, 19 April 1947, in TORRE, *Processus matrimonialis*, 441, no. 2).

¹⁷⁶ Cf. Bassiano UGGÉ, *La fase preliminare/abbreviata del processo di nullità del matrimonio in secondo grado di giudizio a norma del can. 1682 §2*, Tesi Gregoriana – Serie Diritto Canonico 60, Rome, Editrice Pontificia Università Gregoriana, 2003, 225.

¹⁷⁷ See also Carmen PEÑA GARCÍA, "El nuevo proceso *breviore coram Episcopo* para la declaración de la nulidad matrimonial," in *ME*, 130 (2015), 589, *sub* 7.2. Also seeming to be in concert with this view is Mario MEDINA BALAM, who writes that the appellate college confirms the affirmative sentence "si considera que es evidente que la apelación es meramente dilatoria o no tiene fundamento" ("La sentencia, sus impugnaciones, y su ejecución (Art. 4; cc. 1679-1682)," in *RMDC*, 21 (2015), 374).

The first interpretation (viz., the respondent appealing as a delay-tactic) seems to be suggested in the printed remarks of Monsignor Pio Vito Pinto, chair of the special commission. On the day the *motu proprios* were released, he wrote: “The appeal of an affirmative decision can be denied if there is a clear lack of argument, for example in the case of an appeal advanced to harm the other party.”¹⁷⁸ The malicious motive of the appellant against the affirmative sentence is presented here as an example of a “clear lack of argument,” which seems to mean a lack of an argument posed by the appellant. This interpretation, however, seems to neglect the grave matter of the substantive quality of the affirmative decision. In other words, if the respondent poses no argument against the declaration of nullity of the marriage, perhaps was absent from the trial, but now appeals most likely to delay the petitioner’s anticipated marriage, must the appellate tribunal always confirm the affirmative sentence? What if in that same case the appellate tribunal, having examined the acts and the sentence and weighed the arguments of its defender of the bond, sees that the affirmative sentence is based on errors of law or of fact? There seems to be no justice in demanding that the appellate tribunal confirm such a sentence simply because the cause was deferred to it as a result of dilatory motives.

Monsignor Gian Paolo Montini persuasively challenges the restrictive interpretation that reduces the assessment of the appellate judge to a consideration of the personal motivations of the appellant, whether the motives for the appeal are expressed or not. In virtue of, among other things, “the sensibility of canon law against all formalism in favor of substantive truth,” he insists that the actual foundation of the affirmative decision, at the level of merit, must be carefully evaluated in the first place. He declares: “Therefore, if the judges are faced with motives of appeal evidently dilatory in themselves that are actually presented or even absent, while it is evidently apparent to them that the sentence is unfounded, they must refuse to confirm it with a decree and admit it for treatment on appeal.”¹⁷⁹ Notwithstanding the subjective, even dilatory motives of the appellant, the appellate judge cannot neglect an evaluation of the merits of the affirmative decision, since his decree of confirmation would suffer from injustice derived from the affirmative sentence that unjustly or unreasonably declares the nullity of marriage.

¹⁷⁸ Pio VITO PINTO, “By the Will and Authority of Pope Francis. Procedural Reform Pertaining to Declarations of Marriage Nullity,” in *OssRomEng* (September 11, 2015, no. 37), 5. Another member of the commission simply mentions the “manifestly” or “merely dilatory” appeal without explanation (see Alejandro W. BUNGE, “Presentación del nuevo proceso matrimonial,” in *AADC*, 21 (2015), 95, 102).

¹⁷⁹ See MONTINI, “VI. Dopo la decisione giudiziale,” 112-113.

Indeed, as is taught perhaps most eloquently in Pius XII's 1944 discourse to the Roman Rota, the *favor veritatis* is the hallmark of the ecclesiastical judiciary, and all participating, each in accord with his function, is to act *pro rei veritate*.¹⁸⁰ In causes of nullity of marriage, this *favor veritatis* is understood in terms of the *favor matrimonii*: namely, that the whole process is directed toward the discovery of the truth about the marriage whose presumed validity is being challenged and whose alleged nullity is the object of the trial.¹⁸¹ Drawing these principles together, it is certain that all involved in the marriage nullity process must be compelled by zeal for the truth about the marriage in question, the judges before and as an example to all others. And it is this which is to determine the conduct of all during each development of the process.¹⁸² This is confirmed by Pope Francis, who in the preamble to both *motu proprios* stresses the importance of the judicial process for meeting "the demand of greatly protecting the truth of the sacred bond."¹⁸³ Unless one is striving to create a rupture with the Church's firm discipline in the matter, this foundational principle is to be taken as the key to unlocking the fullest meaning of any institute of the judicial order, including that of the "*appellatio mere dilatoria*."

As was explored above, one witnesses a significant development in canonical tradition in the area of the materially unjust appeal. There was a shift in the legislation from the decretals' prohibitions against "evasive and frivolous" appeals to an elimination in the 1917 code and *SN* of any regulation of such appeals. It seems that this shift can be attributed to several factors, not the least of which are the fact that the former regime would often demand a judgment of the typically hidden motives for appealing, and that the right of appeal against a grievance caused by a sentence was to be given maximum legislative protection. Highly noteworthy, however, are some of the elements found in the late transition from the *Ius decretalium* to the 1917 code. In the two pieces of jurisprudence examined above, especially the 1910

¹⁸⁰ Cf. PIUS XII, discourse to the Roman Rota, 2 October 1944, in AAS, 36 (1944), 281-282 and 285 (nn. 1 and 2b).

¹⁸¹ Cf. JOHN PAUL II, discourse to the Tribunal of the Sacred Roman Rota, 24 January 1981, in AAS, 73 (1981), 232-233, no. 5.

¹⁸² Cf. JOHN PAUL II, discourse to the Tribunal of the Roman Rota, 29 January 2004, in AAS, 96 (2004), 351-352, no. 6.

¹⁸³ "Quod fecimus vestigia utique prementes Decessorum Nostrorum, volentium causas nullitatis matrimonii via iudiciali pertractari, haud vero administrativa, non eo quod rei natura id imponat, sed potius postulatio urgeat veritatis sacri vinculi quammaxime tuendae: quod sane praestant ordinis iudicii cautiones." This is the text from *Mitis iudex Dominus Iesus*; virtually the same is stated in *Mitis et misericors Iesus* at the paragraph that begins: "Quidquid autem his Litteris statuimus, id fecimus vestigia ..."

Rotal decision in the cause *Romana*, and in the work of the code commission during the period 1905-1915, there was a pronounced concern not so much for the personal motives of the appellant as much as for empty attacks against the substantive truth declared in the sentence. Such appeals lacked any foundation whatsoever and as such, were they to be entertained, would only delay the execution of the sentence.

In addition to these elements of the canonical tradition, contemporary canonical doctrine and jurisprudence markedly reveal the necessity and sufficiency of a grievance (*gravamen*) against a sentence in order to introduce an appeal. Since this grievance is something objective, it can usually be verified easily by identifying, in the first place, the juridical situation and interests of the appellant and, secondly, his substantive and procedural contributions to the lower level of the trial. When such a grievance is verified or at least not manifestly absent, the appeal must not be rejected at the outset but examined in accord with the norm of law. Moreover, what is critical to recall in the present discussion is that there is strictly speaking no obligation on the part of the appellant to articulate specific motives for appealing. And even if the appeal does state motives, they need not be convincing in order for the appeal to be legitimate.

Accordingly, deciphering whether an appeal is merely dilatory is not a matter of identifying the motives of the appellant and concluding whether or not they are dilatory. In other words, an appeal is not merely dilatory when the respondent appeals only to delay a future marriage of the petitioner or uses the remedy of appeal only to create some other inconvenience for the petitioner or the tribunal. To hold otherwise would, ironically, be to allow the respondent unduly to control the process and to exaggerate the importance of the motives for appeal, contrary to the common understanding. The matter must be weighed in more objective terms and in harmony with the finality of the judicial process. *An appeal is merely dilatory when, notwithstanding the good or ill motives of the appellant, its admission to an ordinary appellate trial would merely delay the execution of a just affirmative sentence.*

This understanding promotes a unified and purer concept of the merely dilatory appeal. The assumption of many canonists has been that such an appeal would be made by the respondent; but one can easily see that the law in this context does not mention the respondent (*pars conventa*). It indicates all those who can appeal—namely, “the [private] party who deems himself aggrieved, and likewise the promoter of justice and the defender of the bond” (*CIC* c. 1680 §1, *CCEO* c. 1365 §1)—and then explains how an appeal *of any of them* is to be treated. Authors have rightly questioned when it would ever happen that the defender of the bond would introduce a merely

dilatory appeal—meaning, why would the defender personally want to delay a petitioner’s anticipated marriage? This more objective understanding resolves that problem. The defender of the bond, even while being prepared in the Church’s sacred discipline, could propose objectively frivolous appeals which, if admitted to trial, would merely delay the execution of just affirmative sentences.

The appeal of a petitioner against a sentence that was partially favorable to him while, to his chagrin, also deciding one ground in the negative—as in the cause *Neopolitana* judged before the Rota¹⁸⁴—could be found to be merely dilatory. For an examination of the acts and the affirmative sentence could reveal to the appellate tribunal that the truth about the nullity of the marriage has already been discovered and declared, and that an appellate trial would only delay the execution of the just declaration of nullity of the marriage. An element of the decree of confirmation of the sentence could include a discussion about the lack of any true grievance on the part of the petitioner. The matter might be different, however, if the affirmative sentence were unfavorable to the petitioner, pertaining rather to a ground introduced by the respondent and opposed by the petitioner. In this case, the affirmative sentence would truly be unfavorable to the petitioner.

This objective understanding of the merely dilatory appeal also corresponds with the full discipline established in canon 1680 §2 (*CCEO* c. 1366 §2). If it were sufficient to verify the dilatory motives of the respondent, and if these motives were “manifestly apparent,” there would be no need to receive the observations of the defender of the bond and the parties. On the contrary, the appellate college of judges is obliged to dedicate itself to a complete, diligent examination of the cause, exactly as it was according to the correct application of the now derogated canon 1682.¹⁸⁵ The appellate defender of the bond and the spouses are to offer their arguments pertaining

¹⁸⁴ *Vide supra*, section 1.2.3, (b) no. 4.

¹⁸⁵ That canon was never meant to prescribe a mere review of the affirmative sentence, attributing the benefit of the doubt to the first instance judges and not to the *favor matrimonii*. The second instance college of judges was itself bound to decide whether it was morally certain of the alleged nullity of the marriage on the ground(s) decided affirmatively in the sentence. If it was not, it was to admit the cause to an ordinary examination. On this problem and the relevant jurisprudence, see William L. DANIEL, “The Notion of Moral Certitude with Particular Application to the Acts Mentioned in c. 1682, §2 (*CCEO*, c. 1368, §2),” in *CLSA Proc.* 72 (2010), 142-174; IDEM, “Motives in *decernendo* for Admitting a Cause of Marriage Nullity to an Ordinary Examination,” in *StC*, 45 (2011), 67-120; IDEM, “Canon 1682 and *Dignitas connubii*, art. 265 §1 and 291 §2. Whether the Substantial Conformity of Decisions Can Be Declared in a Decree of Confirmation of an Affirmative Sentence in Causes of the Nullity of Marriage,” in *RR* 2013, 122-125.

to the confirmation of the sentence or the admission of the cause to an ordinary examination. This would help the judges determine whether all positive doubt about the alleged nullity has been eliminated. If there is no doubt about the alleged nullity of marriage, the college would declare that admitting the cause to an appellate trial would only delay the execution of the sentence; in the face of any doubt or prudent argument needing to be resolved, it would admit the cause to an ordinary examination. Or, in the case of the abbreviated process, the competent appellate bishop or the Dean of the Roman Rota would reject the appeal and thus confirm the affirmative sentence of the bishop of first instance, or admit the cause to an ordinary examination before the competent appellate tribunal.

The above quoted norm governing the abbreviated process speaks of the rejection of the appeal (“*eam a limine decreto suo reiciat*”), and this leads one to recall the institute of the prejudicial question of the legitimacy of the appeal.¹⁸⁶ However, as was explored above, the lack of foundation of an appeal is not in itself a ground for the rejection of an appeal; that is, one whose appeal lacks foundation does not therefore lack the right of appeal. On the contrary, the one whose appeal is merely dilatory enjoys the right to appeal, and this right is respected by the appellate judge in the first place by the preliminary decision on the merits of the cause, in view of the fact that the right to appeal is not precisely the same as the right to an appellate trial. The cited norm of the abbreviated process is clearly parallel to that of the ordinary process:¹⁸⁷ the appellate bishop decides whether treating the appeal would merely delay the execution of the affirmative sentence. If it would—that is, if he himself is morally certain of nullity of the marriage in accord with the specific judgment of the affirmative sentence—he denies its admission to the appellate level of jurisdiction (i.e., an appellate process). If it would not—that is, if there is some basis for the appeal due to the existence of some prudent doubt—the appeal is admitted for judicial treatment before the competent college of judges.

Finally, is the decree confirming the affirmative sentence in either case open to challenge? Certainly, either may be subject to a complaint of nullity, but this would not be a substantive challenge. The decree is itself a declaration of nullity of the marriage, since it briefly narrates the facts, demonstrates the manifest substantive foundation of the affirmative sentence, and by its own right declares the marriage null. Having the force of a definitive sentence—and being a declaration *ad instar sententiae definitivae*—it cannot be

¹⁸⁶ *Vide supra*, section 2.

¹⁸⁷ Cf. Cf. MONTINI, “VI. Dopo la decisione giudiziale,” 116.

appealed as was explained above. Giving rise to a double conformity of affirmative sentences declaring nullity of the marriage, its merits could only be challenged by the extraordinary remedy of the new proposition of the cause.¹⁸⁸ Being a double conformity of sentences in a cause of the status of persons, which can never become a *res iudicata*, there is no place for the remedy of *restitutio in integrum*.

Conclusion

Insertion of the expression “*appellatio mere dilatoria*” in the norms governing the structure of the appeal of a sentence in a cause of nullity of marriage is regrettable for its lack of precision. It has understandably been initially assessed by much of doctrine as alluding to the dilatory motives of the respondent for appealing an affirmative sentence, in order to frustrate and complicate the life of his or her formerly putative spouse. Forensic experience has revealed some such obstructionistic maneuvering, and this interpretation seems to be somewhat in concert with the legislator’s aim of expediting and simplifying the marriage nullity process. Such an interpretation, however, would cast into doubt the principles of the equality of the spouses and in particular the right of the respondent to vindicate the presumed validity of his or her marriage.

One may be encouraged, however, by the proposition that that is not the proper mind of the legislator as regards the merely dilatory appeal. Rather, in continuity with the firm doctrine and jurisprudence according to which the motives of an appellant need not be specifically or technically expressed, especially in causes of nullity of marriage, nor need those expressed be convincing in order for the judge to admit the appeal, the possibly dilatory motives of an appellant are irrelevant on the juridical plane (though presumably immoral if entertained with ill will toward another). Rather, an appeal is merely dilatory only when the solid foundation of the affirmative sentence is so apparent after the superior college of judges has examined the whole cause that its admission to trial would do nothing but delay the execution of what has already been justly decided. The immediate decision of that college, therefore, has nothing to do with an examination of the respondent’s motives but is based principally on an examination of the alleged nullity of marriage as demonstrated and declared by the affirmative sentence, in light of the acts and the observations brought forward by the parties.

¹⁸⁸ See *CIC* cc. 1644 and 1681, *CCEO* cc. 1325 and 1367, *DC* artt. 290-294.

In essence, therefore, the judgment to be made by the superior college of judges is no different than it was prior to the issuance of the two *motu proprio*s. What has changed is how the cause arrived at the appellate tribunal in the first place. Before—that is, under the regime originally established by the *CIC* and the *CCEO*—the law obliged the transmission of the cause to the appellate tribunal after the marriage was first declared null. Now, it is transmitted only when there is a legitimate appeal made by one of the private parties or the defender of the bond (or the promoter of justice if he is intervening). The result is a certain purification in the notion of appeal as a juridical act of a qualified person suffering a grievance caused by the sentence, by which its reform is requested from the superior judge. This lays bare anew the duty of the defender of the bond to appeal any affirmative sentence that is not based on sufficient arguments eliminating any reasonable doubt, for the greater defense of the holy bond of matrimony.

LE DROIT PARTICULIER DE L'ÉGLISE AU CANADA, DE SES ORIGINES (1658) AU CONCILE VATICAN II (1962-1965)

CHANTAL M. LABRÈCHE*

RÉSUMÉ — Au Canada, le droit canonique particulier possède une longue histoire qui remonte aussi loin que l'époque de monseigneur François de Montmorency-Laval, premier évêque de Québec. En effet, les autorités ecclésiastiques n'ont pas attendu l'avènement du deuxième concile du Vatican (1962-1965) pour créer des lois qui tentaient de répondre aux besoins des fidèles du pays. Dans cet article, l'auteur effectue un survol historique du droit particulier de l'Église catholique au Canada, de ses origines (1658) au Concile Vatican II. Il y sera question de la législation promulguée à la suite des synodes diocésains tenus en Nouvelle-France, des divers conciles provinciaux, ainsi que du seul et unique concile plénier à avoir eu lieu au Canada (1909).

SUMMARY — In Canada, particular canon law has a long history that dates back as far as the time of Bishop François de Montmorency-Laval, first bishop of Québec. Indeed, ecclesiastical authorities did not wait for the Second Vatican Council (1962-1965) to occur before they created laws that attempted to meet the needs of the faithful of the country. In this article, the author presents an historical overview of the particular law of the Catholic Church in Canada, from its origins (1658) to the Second Vatican Council. It presents some legislation promulgated in the wake of diocesan synods held in New France, the various provincial councils, and the only plenary council to be held in Canada (1909).

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Ce texte est basé sur une présentation donnée à Charlottetown (IPE) lors du 49^e congrès de la Société canadienne de droit canonique.

Introduction

Le Code des canons des Églises orientales nous dit que, « par droit particulier on entend toutes les lois, les coutumes légitimes, les statuts et les autres règles du droit qui ne sont communes ni à l'Église tout entière, ni à toutes les Églises orientales »¹. À quel moment l'Église au Canada a-t-elle commencé à avoir un droit particulier ? Existait-il avant l'avènement du deuxième concile du Vatican ? Jusqu'où doit-on remonter dans le temps pour trouver les tout premiers décrets particuliers à notre société ? Au Canada, le droit canonique particulier possède une longue histoire qui remonte aussi loin que l'époque de monseigneur François de Montmorency-Laval, premier évêque de Québec.

En effet, dès le tout début de l'établissement de l'Église en Nouvelle-France, le souci des évêques était de « pourvoir au mieux [au] soin spirituel [des fidèles], en tenant compte d'abord des règles établies ou à établir par le Siège apostolique, tout en les adaptant convenablement aux conditions de temps, de lieux et de personnes »². Certains décrets seront présentés dans ce document afin de démontrer l'évolution des mœurs et son influence sur le droit particulier canadien qui s'occupait de tous les aspects de la vie quotidienne des fidèles³.

1 — Sous le Régime français⁴

Il est important de bien comprendre la situation de l'Église en France afin de saisir celle de l'Église en Nouvelle-France. L'Église entretenait à cette

¹ CCEO, canon 1493, § 2. *Codex canonum Ecclesiarum orientalium, auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione auctus*, Libreria editrice Vaticana, 1995, traduction française E. EID et R. METZ (dir.), *Code des canons pour les Églises orientales*, Libreria editrice Vaticana, 1997.

² CONCILE VATICAN II, Décret sur la charge pastorale des évêques dans l'Église *Christus dominus*, 28 octobre 1965, dans AAS, 58 (1966), 673-701 ; traduction française dans *Vatican II*, nouvelle édition revue et corrigée, [Saint-Laurent, Qc], Fides, 2011, n°18, 313 (= CD).

³ Certains termes employés dans ce document ne sont pas toujours politiquement corrects mais ne se veulent nullement péjoratif. Ces termes reprennent les mots employés dans leur époque respective et reflètent simplement la terminologie de ces époques.

⁴ Cette section est largement inspirée de F.G. MORRISEY, « The Development of Particular Canonical Legislation in Canada », dans *Église et théologie*, 11 (1980), 223-245 (= MORRISEY, « Canonical Legislation in Canada ») ; IDEM, « The Development of Ecclesiastical Particular Law in Canada », dans *THE CANADIAN CATHOLIC HISTORICAL ASSOCIATION, Study Sessions*, 50 (1983), 141-158 (= MORRISEY, « Ecclesiastical Particular Law »).

époque d'étroites relations avec l'État. Le pape était le chef de l'Église et le roi, le chef de l'État, veillait à ce que les lois ecclésiastiques soient observées. Le gallicanisme qui régnait alors en France était un accord entre le roi et le clergé pour que l'Église de France soit gouvernée en contrôlant et limitant le rôle du Saint-Siège, comme conséquence de droits supposément acquis dans les temps anciens. « Les canons furent torturés, interprétés de telle façon que les lois de l'Église devaient être confirmées par l'autorité civile pour être obligatoires dans les Églises particulières »⁵. L'objectif du gallicanisme était de défendre les libertés de l'Église de France. Le roi de France avait donc un pouvoir considérable sur ce qui se déroulait dans « son » Église. Lorsque le roi prit la décision qu'il était temps d'ériger un nouveau diocèse en Nouvelle-France, c'est lui qui en fit la demande au pape et qui nomma le premier évêque de la colonie, nomination que le pape ne pouvait qu'accepter. C'est ainsi que l'Église au Canada vit officiellement le jour en 1658⁶ alors que le vicariat apostolique de la Nouvelle-France fut érigé et que monseigneur François-Xavier de Montmorency-Laval (Mgr de Laval) fut nommé vicaire apostolique. Seize ans plus tard, soit en 1674, Québec fut élevé au rang de diocèse⁷ et Mgr de Laval devint le premier évêque de la Nouvelle-France. Moins de quarante ans plus tard, le territoire du diocèse de Québec comprenait alors le Canada et une partie des États-Unis⁸.

1.1 — Mgr de Laval et Mgr de Saint-Vallier

Monseigneur de Laval et son successeur, monseigneur Jean-Baptiste de la Croix de Chevrières de Saint-Vallier (Mgr de Saint-Vallier) contribuèrent largement au développement du droit particulier canadien pendant le Régime français. La législation de monseigneur de Laval consista surtout à régler des problèmes auxquels devait faire face l'Église en Nouvelle-France au dix-septième siècle⁹. Par exemple, en 1660, donc deux ans après la création du

⁵ M. ANDRÉ, art. « gallicanisme », dans *Dictionnaire de droit canonique, ou, Le cours de droit canon de Mgr André (d'Avallon)*, entièrement revu, corrigé, augmenté et actualisé par M. l'abbé CONDIS, vol. 2, Paris, Hippolyte Walzer, 1889, 259.

⁶ 11 avril 1658.

⁷ CLÉMENT X, Bulle érigeant le diocèse de Québec *In arduum Pontificatus fastigium*, 1^{er} octobre 1674, dans H. TÊTU et C.O. GAGNON (dir.), *Mandements, lettres pastorales et circulaires des évêques de Québec*, tome 1 : 1659-1740, Québec, Imprimerie générale A. Côté et C^{ie}, 1887, 82-88 (= *M.E.Q.*, t. 1).

⁸ Le diocèse de Québec couvre tout le continent américain jusqu'au Golfe du Mexique, seules les colonies britanniques qui deviendront plus tard les États-Unis et la colonie espagnole qu'est la Floride ne sont pas sous l'autorité religieuse de l'évêque de Québec.

⁹ Voir MORRISEY, « Canonical Legislation in Canada », 224-225.

vicariat apostolique, monseigneur de Laval décréta de façon radicale l'interdiction de « donner en paiement aux sauvages, vendre, traiter ou donner gratuitement et par reconnaissance, soit vin, soit eau-de-vie, en quelque façon et manière, et sous prétexte que ce soit »¹⁰ sous peine d'excommunication *ipso facto*¹¹. En effet, il se voyait « obligé d'apporter les derniers

¹⁰ FRANÇOIS DE LAVAL, Mandement pour excommunier ceux qui vendent des boissons enivrantes aux sauvages, 5 mai 1660, dans H. TÊTU et C.O. GAGNON (dir.), *Mandements, lettres pastorales et circulaires des évêques de Québec*, tome 1 : 1659-1740, Québec, Imprimerie générale A. Côté et C^{ie}, 1887, 14-15 (= *M.E.Q.*, t. 1).

À l'époque du Régime français, les premiers habitants du Canada, que nous appelons aujourd'hui les peuples des Premières Nations, étaient surnommés « sauvages » par les colons français. Au cours des siècles, les termes « indien », « amérindien », et « autochtone » furent également utilisés. Le terme employé dans ce document reprend les mots employés par monseigneur de Laval et reflète simplement la terminologie de l'époque.

¹¹ *M.E.Q.*, t. 1, 14-15.

Mandement pour excommunier ceux qui vendent des boissons enivrantes aux sauvages. Nous, François de Laval, par la grâce de Dieu et du Saint-Siège, Évêque de Pétrée, Vicaire Apostolique en toute l'étendue de la Nouvelle France et pays adjacents.

Ayant reconnu les grands désordres qu'ont apportés par le passé les boissons enivrantes de vin et d'eau-de-vie données aux sauvages et les suites encore plus funestes qui sont à craindre de jour en jour. Vu d'ailleurs les ordres du roi par lesquels il est fait défense expresse à tous habitants de ce pays, marchands, facteurs, capitaines, matelots, passagers, et à tous autres de traiter en quelque sorte et manière que ce soit, soit vin, soit eau-de-vie, avec les sauvages, à peine de punition corporelle ;

Vu en outre les règlements des gouverneurs qui ont été faits jusqu'à maintenant pour arrêter le cours de ces désordres, et que nonobstant le mal va croissant de jour en jour, autant d'excès qu'il va non-seulement au scandale tout public, mais encore qu'il met tout ce christianisme dans un péril évident d'une ruine totale, dans la crainte que nous avons que Dieu justement irrité ne retire le cours de ses grâces et réserve ses plus rigoureux châtements sur cette Église de laquelle il a plu à sa Divine bonté nous commettre le soin, quoique nous en soyons très-indigne. Enfin nous voyant obligé d'apporter les derniers remèdes à ces maux arrivés dans l'extrémité ; à cet effet nous faisons très expresse inhibition et défense, sous peine d'excommunication, encourue ipso facto, de donner en paiement aux sauvages, vendre, traiter ou donner gratuitement et par reconnaissance, soit vin, soit eau-de-vie, en quelque façon et manière, et sous prétexte que ce soit, de laquelle excommunication nous nous réservons à Nous seul l'absolution. Nous déclarons toutefois que dans ces défenses, sous peine d'excommunication, nous ne prétendons pas y comprendre quelques rencontres qui n'arrivent que très rarement, et où l'on ne peut quasi se dispenser de donner quelque peu de cette boisson, comme il pourrait arriver en des voyages et fatigues extraordinaires et semblables nécessités ; mais même dans ces cas l'on saura que l'on tomberait dans l'excommunication susdite si l'on y excédait la petite mesure ordinaire dont les personnes de probité et de conscience ont de coutume de se servir envers leurs domestiques en ce pays ; et tous ceux qui prétendraient sous ce prétexte user de quelque fraude et tromperie en quelque rencontre que ce soit, se souviendront que rien ne peut être caché à Dieu, et que trompant les hommes, cela n'empêcherait pas que sa malédiction et sa juste colère retombât sur eux. Mais toutefois l'on saura que lorsqu'il s'agira directement ou indirectement de la traite des pelleteries, souliers, et de quoique ce soit, il ne sera aucunement permis de donner aucune

remèdes à ces maux arrivés dans l'extrémité »¹² afin de limiter les conséquences néfastes qui résultaient de cette situation.

La législation de Mgr de Laval n'avait pas seulement une portée sociale mais concernait aussi la vie en Église. Il émit des décrets au sujet de la réglementation pour les enterrements et services dans la paroisse de Québec (10 juillet 1661)¹³,

boisson aux sauvages, non pas même ce petit coup, que, dans les cas susdits, afin qu'on ne tombe point dans notre défense et excommunication. Et afin que personne ne prétende cause d'ignorance de notre dite défense et censure, Nous voulons qu'elle soit envoyée en toute l'étendue de notre juridiction, et que publication en soit faite par trois dimanches consécutifs ou fêtes solennelles, s'il se rencontrait, et qu'elle soit réitérée de trois mois en trois mois, à un premier dimanche du mois, jusqu'à ce qu'autrement en ait été par Nous ordonné. Donné à Québec, en notre demeure ordinaire sous notre sceau et seing et celui de notre secrétaire ce cinquième mai seize cent soixante. François, Évêque de Pétrée.

¹² *M.E.Q.*, t. 1, 15.

¹³ *M.E.Q.*, t. 1, 33-34.

Règlements pour les enterrements et services dans la paroisse de Québec. François, par la grâce de Dieu et du Saint-Siège, Évêque de Pétrée, Vicaire Apostolique en la Nouvelle-France. Sur ce qui nous a été représenté par les curé et marguilliers de la paroisse Notre-Dame de Québec que la plupart des habitants de la dite paroisse demandent à l'envie l'un de l'autre que leurs parents soient enterrés dans l'église, quoiqu'elle soit peu spacieuse et qu'il n'y ait presque point de place pour cet effet, d'autant qu'elle est bâtie sur le roc, ce qui serait cause dès à présent d'une grande incommodité pour la mauvaise odeur qui exhale des corps qui y ont été inhumés jusques à présent. Vu de plus leurs plaintes sur ce que semblablement la plupart des habitants du dit Québec demandent aisément des enterrements honorables pour leurs parents défunts, beaucoup de luminaires, de messes hautes, et de services funéraires, dont ensuite on ne peut tirer aucun paiement, non pas même les droits du fossoyeurs et sonneur, d'où s'ensuit que la fabrique s'engage à plusieurs dettes.

Pour obvier à tous ces désordres, et empêcher un air contagieux et pestiféré qui serait à craindre, si l'on continuait à l'avenir d'enterrer les corps avec la même facilité que par le passé dans la dite église de Québec. Vu d'ailleurs que la plupart des choses énoncées dans la Requête ci-dessus se demandent souvent plutôt par vanité et ambition que par dévotion. Nous, ayant soigneusement examiné le tout, avons ordonné et ordonnons que ci-après aucun ne soit enterré dans la dite église qu'il n'ait payé auparavant pour cet effet la somme de six vingt livres au profit de la fabrique entre les mains des marguilliers, pour le droit d'ouverture d'une fosse, et fait en outre creusé à ses propres dépens une fosse d'une profondeur suffisante. Que l'on paiera pareillement par avance aux dits marguilliers les services qui seront demandés avec les droits du fossoyeur et sonneur.

Faisons défense aux dits marguilliers de fournir aucun luminaire aux frais de l'église sinon aux enterrements et services qui seront faits pour les pauvres qui n'auront le moyen. Et afin que notre présente ordonnance soit exécutée, Nous faisons expresses inhibitions et défenses à ceux qui desserviront ci-après la dite paroisse de Québec, de faire dorénavant quoique ce soit des dits services funéraires, sinon après avoir reçu le paiement des choses qui seront demandées conformément aux règlements qui ont été précédemment faits, lesquels nous avons approuvés et approuvons. Enjoignons aux curé et marguilliers de les faire insérer avec notre présente ordonnance dans le livre des registres de la paroisse. Donné à Québec dans notre demeure ordinaire le dixième de juillet seize cent soixante et un. François, Évêque de Pétrée.

la dîme (10 novembre 1663)¹⁴ et les péchés réservés (21 avril 1669). Dans ce décret, Mgr de Laval déclara :

Nous nous réservons le péché qu'il y a à enivrer les sauvages et à leur vendre ou donner des boissons à transporter en quantité suffisante pour les enivrer, à moins qu'il n'y ait une assurance morale qu'eux ou d'autres sauvages ne s'en enivreraient pas. Comme aussi de ceux qui abusent des filles ou femmes sauvages devant ou après la boisson ou en quelque manière que ce soit. 21 avril 1669. François, Évêque de Pétrée »¹⁵.

François de Laval procéda également à l'établissement du premier Séminaire en Amérique du Nord (26 mars 1663)¹⁶ et de la cour ecclésiastique (11 septembre 1675)¹⁷ qui devait juger de toutes les questions relevant de la juridiction

¹⁴ *M.E.Q.*, t. 1, 47. Relaxation pour six ans de la dîme au vingtième.

François, par la grâce de Dieu et du Saint-Siège, Évêque de Pétrée, Vicaire Apostolique en toute la Nouvelle-France, nommé par le Roi Évêque du dit pays.

À tous les habitants de la paroisse de Québec, Salut.

Déclarons qu'ayant été obligé pour le bien et avancement de ce christianisme d'ordonner que les dîmes seraient levées à la treizième ; Eu égard néanmoins à l'état présent du pays, Nous avons jugé à propos de vous accorder et vous accordons par ces présentes qu'elles ne seront pas payées six années durant qu'à la vingtième. Déclarons en outre que pour contribuer aux nécessités de votre église, nous donnons les dîmes de la présente année mil six cent soixante-trois, à la réserve de celles de la côte de Lauzon et de la Pointe de l'Île d'Orléans, lesquelles seront employées pour bâtir les églises paroissiales des dits lieux.

Donné à Québec en notre demeure ordinaire le dixième novembre mil six cent soixante et trois. François, Évêque de Pétrée.

¹⁵ *M.E.Q.*, t. 1, 77.

¹⁶ *M.E.Q.*, t. 1, 44-46.

¹⁷ *M.E.Q.*, t. 1, 98-99. Érection de l'officialité de Québec.

François, par la grâce de Dieu et du Saint-Siège, premier Évêque de Québec. À tous ceux qui ces présentes lettres verront, Salut.

Considérant que jusqu'à présent la justice ecclésiastique n'a été par Nous établie en cette ville que comme Évêque de Pétrée et Vicaire Apostolique de Sa Sainteté en ce pays ; mais à présent qu'il a plu à Dieu de nous établir au gouvernement de l'Église du Canada comme premier Évêque titulaire d'icelle, il est de notre devoir d'apporter tous nos soins à donner une forme et établissement solide à tout ce qui regarde cette église naissante, et celui de la justice en étant un des plus forts soutiens, Nous avons créé, érigé et institué, et par ces Présentes, créons, érigeons et instituons dès maintenant et à toujours une Justice Ecclésiastique en cette dite ville de Québec, qui sera composée d'un Official, d'un Promoteur et d'un Greffier, auxquels nous ferons délivrer des lettres de provision, pour être par le dit Official la justice administrée à tous nos diocésains suivant le devoir de sa charge ; auxquelles charges vacation avenant, Nous et nos successeurs pourvoiront à l'avenir de plein droit. Avons en outre à la dite justice donné et attribué, donnons et attribuons le pouvoir de connaître de toutes causes civiles et criminelles pour juger selon les lois et ordonnances de France, et procéder autant qu'il se pourra en la forme et manière qui se pratique et se garde dans les cours ecclésiastiques de France, Nous réservant néanmoins la connaissance des matières réservées aux Évêques suivant les dites lois et ordonnances. Et afin que ce soit

de l'évêque¹⁸. Par un décret émis le six novembre 1684¹⁹, il fonda le Chapitre cathédral qui allait le seconder dans l'administration du diocèse²⁰.

1.2 — Les synodes diocésains

Monseigneur de Laval ne convoqua jamais de synode diocésain. Ce fut son successeur, monseigneur Jean-Baptiste de la Croix de Chevreuses de Saint-Vallier, qui convoqua le premier synode, qui eut lieu à Québec le neuf novembre 1690. De fait, c'est à monseigneur de Saint-Vallier que l'on doit les quatre synodes diocésains à avoir lieu sous le Régime français.

Suite à ce premier synode, vingt-six décrets furent émis²¹ et permirent à monseigneur de Saint-Vallier de réglementer, entre autres choses, les messes célébrées dans les maisons particulières²² ; l'assistance à la messe les dimanches et les jours de Fêtes :

Les Curés exhorteront leurs Paroissiens à assister à leurs Paroisses les jours de Fêtes et de Dimanches, ne voulant pas que sur aucun prétexte ils puissent s'en exempter, improuvant surtout celui qu'ils prennent de faire leurs affaires et leurs voyages en ces jours-là, sans une raison très considérable, et sans la permission de leurs Curés²³ ;

Les confessions²⁴, la dîme :

Les Curés et Missionnaires auront soin d'annoncer plusieurs fois en leurs Prônes, que nous avons défendu de recevoir à la Communion Pascale ceux qui n'auront pas payé les Dîmes, étant non-seulement coupables de retenir le bien d'autrui, mais un bien sacré et Ecclésiastique²⁵ ;

chose ferme et stable à toujours, Nous avons aux dites présentes fait apposer le sceau de nos armes, et contresigner par notre secrétaire. Donné à Québec en notre demeure ordinaire le onzième jour de septembre mil six cent soixante et quinze. François, Évêque de Québec.

¹⁸ MORRISEY, « Canonical Legislation in Canada », 224.

¹⁹ Voir *M.E.Q.*, t. 1, 129-133.

²⁰ Voir MORRISEY, « Canonical Legislation in Canada », 225. Ce Chapitre cathédral existe encore de nos jours.

²¹ Voir « Statuts publiés dans le 1^{er} synode tenu à Québec le 9 novembre 1690 », dans *M.E.Q.*, t. 1, 270-274.

²² Statut III « Aucun Ecclésiastique ni Religieux ne dira la Messe dans une maison particulière dans le lieu de son séjour ou de sa mission, sans une permission de Nous, ou de nos Grands-Vicaires » (*M.E.Q.*, t. 1, 270).

²³ *M.E.Q.*, t. 1, statut VI, 271.

²⁴ Statut VIII « On aura soin de ne point accorder l'Absolution à ceux qui ne voudraient pas se soumettre aux Pénitences qui seront imposées suivant les Règles de l'Église et les Ordonnances de ce Diocèse » (*M.E.Q.*, t. 1, 271).

²⁵ *M.E.Q.*, t. 1, statut XI, 271-272.

Le droit à percevoir pour la publication des Bans et les mariages²⁶, les mariages :

Les Curés et les Missionnaires auront soin de garder la louable coutume de ne marier que le matin, après s'être informés si les contractants se sont approchés des Sacrements le jour précédent. Nous défendons surtout de les marier le jour qu'ils auront communie, et à une heure indue de la nuit, et de dire la Messe après midi²⁷ ;

Il y avait aussi les normes entourant les enterrements²⁸ :

À l'égard de la Sépulture, pour conserver l'ancien usage de l'Église, qui défendait d'enterrer dans l'Église, il est à souhaiter qu'on inspire aux peuples de faire enterrer leurs proches dans les Cimetières, comme dans les lieux destinés pour la Sépulture des Chrétiens ; et afin de les éloigner de les faire enterrer dans l'Église, il est ordonné qu'à Québec on ne fera point l'ouverture de la fosse dans l'Église, qu'on n'ait donné 40 écus, à Ville-Marie 100 livres, aux Trois-Rivières 60 livres, pour les Églises de la Campagne 40 livres²⁹ ;

À l'égard des Enterrements, il a été réglé pour les Églises de la Campagne qu'on ne prendra pour l'Enterrement que 6 livres, pour une grande Messe 8 livres, pour une grande Messe, Nocturne et Laudes 12 livres ; pour l'Enterrement d'un enfant trois livres³⁰ ;

Les droits à payer :

Comme il est nécessaire que les droits du Curé et de la Fabrique soient réglés, il a été ordonné que les cierges appartiendront tous aux Curés ; et pour les autres droits, ils seront partagés également entre le Curé et la Fabrique, excepté l'ouverture de la fosse, qui appartiendra toute à la Fabrique³¹ ;

Les Bedeaux eurent également le droit de percevoir, mais pas à n'importe quel prix :

Pour empêcher que les Bedeaux n'exigent des choses au-delà de ce qui est de raison, il a été réglé que dans les Églises de la Campagne, ils ne pourront

²⁶ Statut XIX « Croyant aussi nécessaire de fixer les droits qu'on peut prendre pour la publication des Bans de Mariage, et la Messe qu'on doit dire, nous avons réglé qu'on pourra prendre six livres pour les deux ensembles : et que pour la publication seule des Bans, on ne prendra que quarante sols » (*M.E.Q.*, t. 1, 273).

²⁷ *M.E.Q.*, t. 1, statut XX, 273.

²⁸ *M.E.Q.*, t. 1, statuts XIII-XV, 272.

²⁹ *M.E.Q.*, t. 1, statut XIII, 272.

³⁰ *M.E.Q.*, t. 1, statut XIV, 272.

³¹ *M.E.Q.*, t. 1, statut XVI, 272.

Statut XVIII « Ce sera aux Marguilliers à se faire payer des droits, et à en fournir la part aux Curés » (*M.E.Q.*, t. 1, 272).

prendre pour la fosse et pour les glas que deux livres dix sols pour les grandes personnes, et vingt-cinq sols pour les enfants, et pour la ville de Québec ils ne pourront prendre que trois livres pour les grandes personnes, et deux livres pour les enfants³².

On traita aussi des relations entre les curés et leurs marguilliers :

Pour entretenir l'union qui doit être entre les Curés et les Marguilliers, il a été ordonné que les Curés feront part aux Marguilliers des choses qu'ils souhaiteront faire dans leurs Églises, et que les Marguilliers de leur côté auront soin de ne faire aucun achat considérable sans avoir consulté leur Curé, et sans avoir pris ses avis³³.

Même les prières pour l'Église « qui ne se soutient que par la protection de Notre-Seigneur et celle de sa très Sainte Mère »³⁴ ; et celles pour le roi n'échappèrent pas à la réglementation :

Les Curés et les Missionnaires exhorteront les peuples d'offrir à Dieu leurs prières, jeûnes, aumônes et autres bonnes œuvres pour la sacrée Personne du Roi, pour la Maison Royale et pour tout le Royaume de France : afin qu'il plaise à sa divine bonté [de] couronner ses Armes victorieuses, et faire triompher en même temps la Religion catholique³⁵.

Quatre ans plus tard, suite au deuxième synode diocésain³⁶, monseigneur de Saint-Vallier émit vingt-sept décrets³⁷ qui avaient pour but de régler certains détails. Par exemple, la publication des bans³⁸ :

Ils ne sauraient être trop exacts à demander aux étrangers et inconnus, avant de les marier, des preuves certaines qu'ils n'ont point contracté avec d'autres ; et afin de n'y être point trompés, Nous ordonnons dans les cas particuliers et embarrassants qu'ils Nous consultent, ou nos Grands Vicaires³⁹.

³² *M.E.Q.*, t. 1, statut XVII, 272.

³³ *M.E.Q.*, t. 1, statut XXI, 273. Au sujet des Marguilliers, un autre décret disait : « Il a été réglé que les Marguilliers auront soin de fournir le luminaire, les hosties, et le vin nécessaire au Sacrifice, non-seulement aux jours de Dimanches et de Fêtes ; mais encore aux autres jours de la semaine » (*M.E.Q.*, t. 1, statut XXII, 273).

³⁴ *M.E.Q.*, t. 1, statut XXIV, 273.

³⁵ *M.E.Q.*, t. 1, statut XXIII, 273.

³⁶ Ce synode eut lieu à Ville-Marie (Montréal) les 10 et 11 mars 1694.

³⁷ Voir « Statuts publiés dans le second synode tenu à Ville-Marie le 10 et 11 de mars de l'année 1694 », dans *M.E.Q.*, t. 1, 316-322.

³⁸ *M.E.Q.*, t. 1, statuts XVII-XIX, 318-319.

Statut XVII – « Nous invitons les Curés et Missionnaires à faire connaître à leurs Paroissiens qu'ils ne doivent pas demander si facilement la dispense de la publication des Bans de mariage, étant une règle établie par le Saint Concile de Trente, dont on ne doit pas se dispenser sans grande raison » (*M.E.Q.*, t. 1, 318-319).

³⁹ *M.E.Q.*, t. 1, statut XVIII, 319.

La confession⁴⁰

Et pour empêcher autant qu'il est en Nous les sacrilèges que nous regardons comme les plus énormes péchés et que nous craignons n'être que trop fréquents, dans ce Diocèse, soit par le peu de soin que l'on prend d'examiner sa conscience et de dire tous ses péchés, soit par la coutume que l'on a prise d'approcher toutes les grandes Fêtes des Sacrements sans songer à se convertir, soit enfin par la crainte de se faire connaître tel que l'on est à son Confesseur : Nous nous croyons engagé indispensablement d'imposer une étroite obligation à tous les Curés et Confesseurs de ce Diocèse, tant Séculiers que Réguliers, de donner liberté à ceux qu'ils Confessent et de les obliger même d'aller à d'autres Confesseurs une fois ou deux l'année dans d'autres Fêtes, excepté celles de Pâques où la Confession et Communion doit se faire autant qu'il se peut à son propre Pasteur⁴¹.

– et les péchés⁴² :

[Les Curés et les Missionnaires] ne peuvent représenter trop fortement aux pères et mères l'obligation qu'ils ont de séparer de lit les enfants de différents sexes, et de ne les point coucher avec eux, [l'absolution de] ces péchés étant ordinairement réservé[e] aux Évêques dans les autres Diocèses⁴³.

⁴⁰ *M.E.Q.*, t. 1, statuts XXI-XXVII, 319-321.

Statut XXI – « Les Curés et Missionnaires auront soin de faire connaître au peuple les Cas qui sont réservés à Monseigneur l'Évêque, dont ils ne pourront point absoudre, et qui sont portés par un Mandement exprès » (*M.E.Q.*, t. 1, 319).

Statut XXV – « Nous exhortons les Confesseurs de ce Diocèse à faire une attention particulière sur les règles de l'Église pour se mettre en état de les observer, afin de ne pas donner les choses saintes aux chiens ; et comme il n'arrive que trop souvent que les Chrétiens de ce siècle, trop faibles et indolents dans la charité, prennent occasion de faire reproches à ceux qu'ils ne voient pas approcher de la sainte Table en certaines Fêtes et de dire publiquement qu'ils n'ont point reçu l'absolution ; Nous exhortons les Confesseurs de leur faire connaître la gravité d'un tel péché, qui va à ôter le remède le plus efficace que l'on peut employer pour convertir les pécheurs, qui est de différer l'absolution, et Nous les invitons même de prendre occasion de leur retrancher quelquefois la sainte Communion, pour leur faire connaître par leur propre expérience, que le jugement qu'ils veulent porter, que les personnes qui ne communient point n'ont point reçu l'absolution, peut être faux ou téméraire, comme en effet il est en leur endroit » (*M.E.Q.*, t. 1, 320).

⁴¹ *M.E.Q.*, t. 1, statut XXIV, 320.

⁴² *M.E.Q.*, t. 1, statuts XI-XIV, XX, 318-319.

Statut XII « [Les Curés et Missionnaires] ne sauraient imprimer trop d'horreur du péché de ceux qui, au mépris des lois de l'Église, emploient les Dimanches et les Fêtes en voyages, travaux et autres choses encore plus mauvaises, comme jeux et ivrogneries » (*M.E.Q.*, t. 1, 318).

Statut XIII – « Les confesseurs ne sauraient avoir trop d'attention et d'exactitude à refuser l'absolution à ceux qui forment des inimitiés et des jalousies par leurs médisances, qui vont à anéantir la charité parmi leur frères » (*M.E.Q.*, t. 1, 318).

⁴³ *M.E.Q.*, t. 1, statut XX, 319.

Un « Mandement pour les cas réservés »⁴⁴ fut publié en même temps. Parmi ces cas réservés, on retrouvait, entre autres :

1. Ceux qui profèrent en public, ou écrivent quelque chose d'injurieux contre Dieu, la Sainte Vierge et les Saints.

2. La Magie, par laquelle nous entendons ceux qui se servent des moyens illicites, et qui n'ont aucun rapport avec l'effet qu'ils veulent produire, et ceux qui les consultent.

[...]

⁴⁴ Voir « Mandement pour les cas réservés (10 mars 1694) », dans *M.E.Q.*, t. 1, 328-331.

« [...] Nous avons jugé à propos de mettre ici ceux que nous nous réservons à Nous, dont nous donnerons très difficilement la permission d'absoudre.

[...]

3. Frapper son père, ou sa mère, et leur refuser les secours qu'on peut, et qu'on doit leur donner.

4. Commettre inceste avec parents ou alliés au premier, ou second degré, sans y comprendre l'inceste de cousin germain avec la cousine germaine.

5. Ceux qui commettent les détestables péchés de Sodomitique et de bestialité.

6. L'Adultère, ou le Concubinage public tellement notoire qu'on ne puisse pas le celer, et le Viol attenté des jeunes enfants par de grandes personnes.

[...]

12. Il serait aussi très important de nous réserver le crime de Sacrilège, que commettent les personnes qui osent s'approcher de la Sainte Table, sans avoir été confessées, ayant le cœur rempli de péchés mortels ; ou qui s'y étant présentées, et n'ayant point reçu l'absolution, ne laissent pas de communier par crainte, ou par respect humain ; ou ceux qui cachent leurs péchés à confesse. Ce péché si détestable devant Dieu, qui fait que des Chrétiens passent toute leur vie dans le Sacrilège, mériterait sans doute un traitement plus sévère pour le bannir de ce Diocèse, et pour en éloigner toutes les occasions qui y peuvent quelquefois porter par la faiblesse des pénitents. Nous imposons à tous les Curés, Missionnaires, et à tous les Confesseurs du Diocèse l'obligation de donner la liberté à ceux qu'ils confessent d'aller à d'autres Confesseurs et de les y faire aller une fois ou deux l'année dans les grandes Fêtes, excepté celle de Pâques, la Confession et Communion devant pour lors, autant que l'on peut, se faire à son propre Pasteur.

Nous déclarons encore que nous gémissons sur la profanation qu'on fait dans ce Diocèse des jours de Fêtes par les voyages, travaux, ventes, achats qui se font sans nécessité, et sans permission de l'Église : ces deux conditions étant nécessaires pour autoriser le travail en ces jours. Nous sommes disposé à prendre toutes les voies les plus convenables pour arrêter un si grand désordre.

Nous ne sommes pas moins touché de voir un grand nombre des habitants de ce Diocèse tomber dans le péché d'Usure, pour vouloir se servir de la commodité qu'ils veulent avoir de tirer de l'intérêt de leur argent, en le prêtant plutôt que de l'employer à quelque commerce permis ; et Nous leur déclarons que tous ceux qui prêtent leur argent, ou quelque chose que ce soit pour en tirer de l'intérêt, à moins qu'ils ne soient pressés de le faire et qu'ils ne soient d'ailleurs dans le cas du dommage émergeant, ou du lucre cessant, sont véritablement usuriers et dignes de la colère de Dieu. Nous déclarons que nous n'admettons point *periculum sortis*, comme un titre légitime, et nous désirons qu'on suive en cela Nos sentiments dans ce Diocèse, de quoi nous chargeons la conscience des Confesseurs » (*M.E.Q.*, t. 1, 329-330).

7. Ceux qui mangent de la viande le Carême, et autres jours que l'Église défend, sans nécessité et sans avoir obtenu la permission du Curé, ou autre Supérieur Ecclésiastique.

8. Ceux qui font des Libelles, ou Chansons diffamatoires.

9. Le Duel dans lequel sont compris non-seulement ceux qui se battent en Duel, mais aussi ceux qui provoquent.

10. Ceux qui pouvant payer leurs Dîmes, n'y satisfont pas dans le temps marqué par nos Ordonnances qui est le temps de Pâques. Nous nous réservons à Nous seul l'examen des moyens de ceux qui ne veulent pas payer les Dîmes.

11. Le péché d'Impureté des Français avec les Sauvageesses.

Plusieurs aspects de la vie en paroisse furent réglementés... Il y eut même un décret qui se préoccupait de l'heure de la messe paroissiale les dimanches et jours de Fêtes :

Les Curés et Missionnaires diront exactement la Messe de Paroisse les Dimanches et Fêtes à neuf heures et demie en été et auront soin pour cela de quitter les Confessions ; et comme nous désirons que l'on se serve de la même forme de Prône et de Catéchisme dans tout ce diocèse, Nous mandons à tous les Curés et Missionnaires de nous envoyer copie du Prône dont ils ont coutume de se servir, afin que nous réglions celle à laquelle il faudra s'arrêter⁴⁵.

En 1698⁴⁶, suite au troisième synode diocésain, les décrets émis⁴⁷ portèrent, entre autres, sur l'importance de la musique dans la liturgie⁴⁸,

⁴⁵ *M.E.Q.*, t. 1, statut XV, 318.

⁴⁶ 27 février 1698.

⁴⁷ Voir « Statuts publiés dans le 3^e synode tenu à Québec le 27^e février de l'année 1698 », dans *M.E.Q.*, t. 1, 368-375. Quarante-trois décrets furent émis suite à ce synode.

⁴⁸ Statut XX – « Nous avons reconnu dans les Visites que nous avons faites des Paroisses de la Campagne, le besoin qu'elles avaient de Chantres pour aider aux Curés à chanter l'Office divin ; et comme il est très difficile d'en trouver de bons, à cause qu'on ne peut leur accorder d'émoluments, Nous avons cru à propos de régler, puisqu'il est du devoir des Marguilliers d'en procurer aux Curés qui ne peuvent eux seuls chanter la grande Messe, ni les autres Offices divins dans les lieux où ils ne pourront point leur donner d'émoluments à cause de la pauvreté de la Paroisse, et où ils ne pourront leur fournir des surplis, les dits Chantres, quoique non revêtus des surplis jouiront des prérogatives d'avoir le Pain-bénit, et l'Eau-bénite devant les Marguilliers, qui se doivent faire un plaisir de leur accorder les dites prérogatives, puisque c'est à eux à s'acquitter des obligations de l'Église, et à lui faire honneur. Cependant, il ne sera pas permis indifféremment à toutes sortes de personnes de se mettre dans les Bancs du Chœur, pour chanter et jouir des avantages accordés aux dits Chantres, mais seulement à ceux qui auront l'approbation du Curé, et l'agrément des Marguilliers » (*M.E.Q.*, t. 1, 372-373).

l'observance du dimanche et des jours de Fêtes⁴⁹, l'organisation des écoles catholiques dans chaque paroisse⁵⁰, l'instruction des ouailles :

Comme l'obligation la plus essentielle des Pasteurs, est l'instruction de leurs ouailles, Nous ne pouvons nous empêcher de leur remettre devant les yeux le compte terrible qu'ils auront à rendre à Dieu, s'ils laissent périr les âmes sans leur donner la nourriture spirituelle : Nous jugeons que la plus nécessaire de toutes est le Catéchisme, où ils doivent engager non-seulement les enfants de se trouver, mais les grandes personnes, surtout les pères de famille⁵¹.

La question de la dîme fut une fois de plus abordée :

Nous renouvelons la défense que nous avons faite plusieurs fois, de recevoir à la Communion Pascale, ceux qui n'ont pas payé leurs dîmes, comme coupables de sacrilège, pour avoir retenu un bien sacré et Ecclésiastique⁵².

⁴⁹ *M.E.Q.*, t. 1, statuts VI-VII, 369-370.

Statut VI – « Nous désirons que les Prédicateurs, tant Séculiers que Réguliers, portent souvent les Peuples à se rendre assidus à la Messe de Paroisse les Fêtes et les Dimanches, et aux Instructions qui s'y font, et que les Confesseurs les interrogent sur ce point, pour leur faire remarquer les suites fâcheuses où ils s'exposent, s'ils se dispensent d'un devoir si légitime, comme est celui d'assister à la Messe de Paroisse les Fêtes et les Dimanches, et d'y entendre la parole de Dieu : Nous condamnons surtout le prétexte qu'un grand nombre de Paroissiens prennent de faire ces jours-là leurs voyages, et leurs affaires temporelles sans une raison très considérable, qu'ils doivent faire connaître à leur Pasteur avant que de l'entreprendre, ou après, s'ils ne le peuvent faire auparavant ; Nous sommes si touché de l'abus extraordinaire qui se fait de ces saints jours, destinés de Dieu pour être employés à son service, que nous ne voulons pas que les Confesseurs de notre Diocèse, tant Séculiers que Réguliers, en puissent absoudre, sans obliger les coupables d'aller trouver leurs Curés pour leur promettre de n'y plus retomber : Que s'ils paraissent conserver la volonté de continuer dans ces saints jours de faire leurs voyages ou affaires après en avoir été avertis, Nous les jugeons indignes d'absolution, dont nous chargeons la conscience des Confesseurs qui en rendront un terrible compte au jugement de Dieu ». (*M.E.Q.*, t. 1, 369-370). Statut VII – « Nous désirons que les Confesseurs agissent avec autant de fermeté à l'égard de ceux qui se laissent aller à vendre, ou à travailler de leurs métiers, les jours de Dimanche et de Fêtes, déclarant indignes d'absolution ceux qui voudront continuer dans la transgression de ces deux Commandements de Dieu et de l'Église ; Nous mettons dans ce nombre les Chirurgiens, et les Barbiers qui font le poil et la barbe les Dimanches et les Fêtes, s'ils ne promettent de ne le plus faire sans permission, et jamais pendant le Service Divin, les Notaires qui passent des Contrats qui ne sont pas absolument ou autant nécessaires, que l'est le Testament d'un moribond qui ne peut pas attendre, et les Marchands qui vendent ces jours-là, quand ils ne le feraient pas publiquement, mais seulement en cachette, s'ils le font sans grande nécessité, et sans une permission de l'Église » (*M.E.Q.*, t. 1, 370).

⁵⁰ Statut XI – « Si les enfants ne peuvent pas venir tous les Dimanches et Fêtes à l'Église, les Curés les doivent engager de venir quelque autre jour de la semaine le matin, pour entendre la Messe et d'apprendre les vérités de la Religion dans le Catéchisme : Nous en avons fait dresser un pour l'utilité de ce diocèse, que nous faisons imprimer, auquel nous désirons que tout le monde s'arrête » (*M.E.Q.*, t. 1, 371).

⁵¹ *M.E.Q.*, t. 1, statut X, 370.

⁵² *M.E.Q.*, t. 1, statut VIII, 370.

On ne peut s'empêcher de remarquer que certaines situations présentes à cette l'époque existent encore aujourd'hui. Mais si la situation est semblable, la réaction est certainement très différente !

Nous ne pouvons pas nous empêcher de gémir sur l'abus qui s'est glissé dans plusieurs paroisses, de sortir du Prône qui se fait durant la grande Messe ; ce mal qu'on peut regarder comme la plus grande marque d'indévotion et d'irréligion qu'on puisse donner, mérite que les Curés et autres Confesseurs agissent à l'égard de ceux qui y tombent plusieurs fois, comme à l'égard des scandaleux publics, auxquels on doit non-seulement refuser l'absolution, mais même la Communion⁵³.

Au moment de ce troisième synode, une « addition » de quatorze décrets fut publiée⁵⁴. Les sujets traités étaient aussi variés que la bénédiction de « l'Eau-bénite »⁵⁵, la procession avant la « Grand'Messe »⁵⁶, la règle de la frugalité dans les repas pour les curés⁵⁷, la confession des enfants qui doivent recevoir la confirmation⁵⁸, et les péchés réservés :

À l'égard du septième, qui regarde ceux qui mangent de la viande les jours défendus, il a été réglé, que ceux qui iront à la chasse de l'Original pendant le carême doivent en demander permission aux Curés, lesquels doivent examiner les motifs, et la nécessité qu'ils ont de faire ces Chasses, sans quoi on les traitera comme gens tombés dans le Cas réservé⁵⁹.

Le quatrième et dernier synode diocésain tenu durant le Régime français eut lieu à Québec le huit octobre 1700. Les décrets⁶⁰ portèrent principalement sur le sacrement de la pénitence⁶¹, ainsi que sur la vie et le ministère des prêtres⁶².

⁵³ *M.E.Q.*, t. 1, statut XV, 371-372.

⁵⁴ Voir « Addition aux Statuts synodaux, réglés dans la 3^e séance du synode », dans *M.E.Q.*, t. 1, 375-377.

⁵⁵ *M.E.Q.*, t. 1, statut VI, 376.

⁵⁶ Statut VII – « Ceux qui pourront faire la Procession avant la Grand'Messe dehors ou dedans l'Église, la feront au moins quelquefois, surtout l'été » (*M.E.Q.*, t. 1, 376).

⁵⁷ Statut X – « Les Curés auront soin de garder la règle de la frugalité dans les repas qu'ils feront le jour de la Fête de leur Patron, et autres jours » (*M.E.Q.*, t. 1, 376).

⁵⁸ *M.E.Q.*, t. 1, statut XII, 376. La confession doit être faite « un mois avant la visite de Monseigneur l'Évêque ».

⁵⁹ *M.E.Q.*, t. 1, statut II, 375.

⁶⁰ Voir « Statuts publiés dans le 4^e synode tenu à Québec le 8 octobre 1700 », dans *M.E.Q.*, t. 1, 390-398. Trente-trois décrets furent émis.

⁶¹ Voir MORRISEY, « Ecclesiastical Particular Law », 143.

⁶² Statut XXIV « [Les Curés et Missionnaires] doivent veiller que dans leurs Églises, il y ait toujours quelque personne marquée pour empêcher les entretiens, les immodesties, et les autres irrévérrences qui se pourraient commettre ; ce sera, autant qu'il se pourra, un Ecclésiastique, ou un Religieux, ou une personne sage et approuvée » (*M.E.Q.*, t. 1, 396).

[Les Curés et Missionnaires] doivent avertir les personnes du sexe de ne se point présenter à confesse la nuit, ni dans les Sacristies⁶³.

Nous les exhortons de tout notre cœur à tenir la main que les enfants ne soient point enseignés publiquement dans les écoles, ni dans les maisons particulières par des personnes de différent sexe, et de mauvaises mœurs, ou d'une doctrine suspecte ; de bannir de leurs Paroisses tous les Livres suspects, ou propres à inspirer le libertinage ; d'ôter l'abus qui paraît s'être glissé de danser, ou de faire des assemblées nocturnes, surtout entre personnes de différent sexe, comme occasions prochaines de grands péchés. À quoi ils doivent tâcher de remédier par le refus même de l'absolution ; ils la doivent aussi refuser à ceux qui n'observent pas les Dimanches et les Fêtes, comme sont les Marchands qui vendent ces jours-là, ou les Cabaretiers qui donnent à boire ces mêmes jours aux pères de famille, qui sont par là engagés à dépenser leurs biens et laisser leurs enfants dans la pauvreté et dans la misère⁶⁴.

Il y a un décret qui ne peut être passé sous silence...

[Les Curés] ne doivent laisser passer aucunes Fêtes et Dimanches sans annoncer la parole de Dieu, d'une manière solide, claire, intelligible ; mais en même temps très courte, l'expérience nous apprenant que les longs Sermons excitent plutôt à l'impatience qu'à la pratique des vertus⁶⁵.

Le premier manuel de droit particulier publié au Canada et regroupant les décrets émis au cours des quatre synodes diocésains parut sous le titre *Statuts, ordonnances et lettres pastorales*⁶⁶. Monseigneur de Saint-Vallier fut particulièrement reconnu pour son *Catéchisme du diocèse de Québec* paru en 1702 dans lequel pouvait aussi être trouvés divers décrets émanant des synodes diocésains. L'année suivante, il publia également le *Rituel du diocèse de Québec* qui demeura en vigueur pendant plus de cent ans, soit jusqu'en 1836. « En pratique, il faut reconnaître que le Catéchisme et les documents qui l'accompagnaient constituaient la législation locale de l'Église pendant le Régime français »⁶⁷.

Statut IX « Nous conjurons les Curés et Missionnaires de se rendre très fidèles à faire chaque année une retraite pour se renouveler dans l'esprit Ecclésiastique, et se mettre en état de faire leurs fonctions, et de remplir toutes les obligations de leur état avec plus de fidélité » (*M.E.Q.*, t. 1, 392-393).

Statut XXI « Nous ne saurions approuver que les Curés et Missionnaires fassent les fonctions de Médecin et de Chirurgien » (*M.E.Q.*, t. 1, 396).

⁶³ *M.E.Q.*, t. 1, statut XXV, 396.

⁶⁴ *M.E.Q.*, t. 1, statut XX, 395-396.

⁶⁵ *M.E.Q.*, t. 1, statut VIII, 392.

⁶⁶ Voir MORRISEY, « Canonical Legislation in Canada », 226.

⁶⁷ MORRISEY, « Ecclesiastical Particular Law », 143.

2 — *Le régime britannique*

La capitulation de Québec le dix-huit septembre 1759 et la capitulation de Montréal un an plus tard⁶⁸ vint changer le cours de l'histoire de l'Église catholique au Canada. Le Régime britannique (1760-1840), y compris le Régime militaire (1760-1763), vint freiner toute activité canonique d'importance. La principale préoccupation du diocèse de Québec était alors de vivre dans un pays dont le souci constant était la guerre. La domination anglaise fut particulièrement difficile pour l'Église. Pendant ses premières années au pouvoir, le nouveau gouvernement, bien que laissant la liberté religieuse aux nouveaux sujets de Sa Majesté Britannique, était opposé à la tenue des synodes, à la division du diocèse, et à tout ce qui pouvait donner du prestige au catholicisme⁶⁹. Il faudra attendre le milieu du dix-neuvième siècle avant de pouvoir assister à un premier concile provincial et à une reprise de la législation particulière au Canada.

2.1 — Les conciles provinciaux de Québec⁷⁰

« L'office principal des conciles provinciaux est surtout de rechercher et de fixer les moyens pratiques d'action pour amender les mœurs, corriger les abus, régler les difficultés, obtenir un accroissement de la foi, et aviser aux règles disciplinaires les mieux adaptées aux circonstances et aux besoins actuels de la province »⁷¹. Le six janvier 1851, soit cent cinquante-et-un ans après le dernier synode diocésain, monseigneur Pierre-Flavien Turgeon, archevêque de Québec, convoqua le premier concile provincial d'une série de sept conciles provinciaux qui réunirent les évêques de la province ecclésiastique de Québec au cours des trente-cinq prochaines années⁷². En tout, ce sont plus de cent soixante-dix décrets qui furent promulgués entre 1851 et 1886. Certains de ces décrets étaient plus importants que d'autres, certains plus intéressants que d'autres. Ces décrets portaient sur des sujets variés touchant autant la vie en société que la vie en Église.

⁶⁸ 8 septembre 1760.

⁶⁹ SCHMEISER, « Development of Canadian Ecclesiastical Provinces », 140 ; voir aussi B. DESROCHERS, *Le premier concile plénier de Québec et le Code de droit canonique*, Washington, Catholic University of America Press, 1942, 2 (= DESROCHERS, *Premier concile plénier*).

⁷⁰ Pour une étude plus approfondie, voir J. GRISÉ, *Les conciles provinciaux de Québec et l'Église canadienne (1851-1886)*, Montréal, Fides, 1979 (= GRISÉ, *Conciles provinciaux*).

⁷¹ IUNG, « concile », col. 1275.

⁷² Les conciles eurent lieu en 1851, 1854, 1863, 1868, 1873, 1878 et 1886.

Au premier concile tenu en 1851, certains des décrets adoptés⁷³ concernaient la profession de foi, les solennités, le chant et la musique dans les églises, l'incorporation des prêtres étrangers, les examens des jeunes prêtres, les sociétés secrètes, les écoles mixtes, etc.⁷⁴. L'un des décrets traita des cas réservés qui étaient alors le concubinage public et le fait de louer des logements à des prostituées notoires⁷⁵. Un sujet en particulier retint l'attention des évêques lors de ce concile... les servantes des prêtres. La question proposée à la commission était formulée ainsi : « Doit-on défendre sous peine de suspense au clergé de cette Province de loger chez eux des servantes à moins qu'elles n'aient 40 ans et soient au-dessus de tout soupçon, même s'il s'agit de leur mère, sœur ou nièce ? »⁷⁶. Il fut suggéré de défendre de recevoir une proche parente si elles ont entre douze et vingt-cinq ans car,

[I]es curés auraient alors trop de surveillance à faire et, comme ils doivent souvent s'absenter, il leur serait impossible de s'en acquitter. De plus, cela risquerait de faire parler les gens quand des confrères viendraient les visiter. Dans des cas particuliers, l'évêque pourrait toujours permettre de

⁷³ Ce premier concile eut lieu du 15 au 28 août 1851. Voir la liste des décrets dans GRISÉ, *Conciles provinciaux*, 382.

⁷⁴ De plus, certains sujets ont été étudiés au cours de ce concile sans que cela débouche sur l'élaboration d'un décret. Prenons, par exemple, les danses et les spectacles (voir *ibid.*, 94). Il est admis que les danses ne sont pas mauvaises en soi et qu'elles peuvent donc, par conséquent, être tolérées... particulièrement dans les villes où ce serait très difficile de les empêcher. MAIS, « elles doivent cependant ne pas devenir une occasion prochaine de péché » (*ibid.*). Plusieurs conditions sont posées pour la tenue d'une danse : « qu'il ne s'y fasse rien contre la pudeur, que les parents y conduisent eux-mêmes leurs enfants, qu'elles se terminent avant dix heures, qu'il n'y ait pas de boissons enivrantes » (*ibid.*). De plus, on ne croit pas que « la valse ou la polka ou toute autre danse de cette nature, puisse être tolérée, à cause des dangers qu'elles présentent » (*ibid.*). Une suggestion est émise : « là où ces danses ne sont pas encore introduites, un curé devrait veiller à ce qu'elles ne le soient pas ; si elles le sont déjà, il devrait essayer prudemment de les faire cesser. Quant aux spectacles, il suffit qu'ils ne soient pas contre les bonnes mœurs ou contre la religion, et que les acteurs y soient décentement vêtus » (*ibid.*).

⁷⁵ *Ibid.*, 83. « Quant aux cas réservés, [les évêques] avaient souhaité, à leur réunion de mai 1851, en maintenir sept. La commission n'en retenait plus que trois et le décret final n'en mentionne que deux : le concubinage public et le fait de louer des logements à des prostituées notoires ». Note en bas de page : « Le troisième cas qu'on laissait tomber concernait le duel. Mgr Turgeon avait souhaité avant le concile que le fait de ne pas payer la dîme ne soit plus un péché réservé. Par ailleurs, après le concile, il regrettera que l'on n'ait pas conservé la sorte de réserve qui accompagnait l'adultère et qui faisait perdre au coupable le droit de demander à son conjoint l'union conjugale jusqu'à ce que le confesseur l'ait permis de nouveau. L'archevêque donnait pour raison que tous les auteurs mentionnaient encore cette réserve. Turgeon à Bourget, 18 mai 1853 ».

⁷⁶ *Ibid.*, 90-91.

déroger à ce règlement. Car on sait que dans plusieurs endroits, il est très difficile de trouver des servantes “convenables” ayant l’âge de quarante ans⁷⁷.

Après maintes délibérations, « le décret approuvé en fin de compte par les Pères sera assez libéral. [Il fut décidé que] les curés pourront loger chez eux leur mère, sœur ou nièce. Les ménagères devront être d’un âge avancé et avoir bonne réputation »⁷⁸.

Le deuxième concile provincial convoqué par monseigneur Turgeon eut lieu trois ans plus tard, soit du vingt-huit mai au quatre juin 1854⁷⁹. Cette fois-ci, les décrets promulgués⁸⁰ portèrent surtout sur l’administration des sacrements. Par exemple, le baptême des protestants :

Il faut rebaptiser sous condition, les protestants qui se convertissent, à moins qu’on ne puisse établir avec certitude que leur baptême a été administré avec toutes les exigences voulues⁸¹.

La pénitence :

Relativement au sacrement de pénitence, on désire que les fidèles ne soient pas obligés de se confesser à leur curé, quelles que soient les coutumes contraires qui aient pu exister auparavant⁸².

Certains des autres décrets traitaient du serment, de la dévotion à la Sainte Vierge, de la vie des clercs :

Un décret sur le mode de vie des ecclésiastiques ne donne qu’une exhortation générale à la piété, à l’étude, au zèle et à la modestie. On insiste pour que les clercs portent en toute circonstances la soutane et la tonsure, qu’ils s’abstiennent des spectacles mondains et qu’ils soient très discrets lorsqu’ils ont à rencontrer des femmes⁸³.

Il y eut également des décrets sur les curés et autres prêtres ayant charge d’âmes :

Le pasteur de chaque paroisse ne doit pas négliger non plus “cette coutume si salutaire” de visiter toutes les familles. Il ne doit pas attendre au presbytère que les gens viennent le voir mais il doit aller vers eux⁸⁴.

⁷⁷ Ibid., 91.

⁷⁸ Ibid.

⁷⁹ Neuf évêques participèrent à ce deuxième concile (voir la liste des participants dans *ibid.*, 363-364).

⁸⁰ Voir la liste des décrets du deuxième concile dans *ibid.*, 383.

⁸¹ Ibid., 152-153.

⁸² Ibid., 153.

⁸³ Ibid., 154.

⁸⁴ Ibid., 159.

« Un autre décret sur les vicaires ajoute une exhortation à ne travailler que sous la direction du curé et à s'entendre parfaitement avec lui »⁸⁵.

Parmi les devoirs des curés, on retrouvait l'administration des biens ecclésiastiques :

Les pasteurs [doivent] veiller à ce que les marguilliers soient des gens dignes de cette fonction. Ces administrateurs ne [doivent] pas, dans l'exercice de leur charge, dépasser les limites de la loi. Les livres de compte seront tenus avec exactitude. Le curé ne doit pas être trésorier. Les biens personnels du curé seront strictement distincts des biens de la fabrique. Toute modification faite aux immeubles devra être approuvée auparavant par l'évêque⁸⁶.

La longueur et la forme du sermon étaient encore à l'ordre du jour, plus de cent cinquante ans après le décret émis par monseigneur de Saint-Vallier, celui qui demandait de prêcher « d'une manière solide, claire, intelligible ; mais en même temps très courte »⁸⁷. Voici ce qu'on en disait en 1854 :

On exhorte aussi les curés à prêcher régulièrement sur "tout ce qui est nécessaire au salut". Ils devront s'adapter à leur auditoire et n'être pas trop longs. Qu'ils se fassent un programme à l'avance, au moins durant l'Avent et le Carême, en suivant par exemple les énoncés du credo, l'ordre des commandements de Dieu ou celui des sept sacrements. Les curés devront se garder de parler de politique ou de questions profanes dans leurs sermons ; ils ne traiteront pas non plus de querelles personnelles. Ils doivent s'attaquer aux vices et non aux personnes⁸⁸.

La question des ménagères revint également dans la discussion. Le « premier concile avait permis aux curés d'avoir pour le service du presbytère des parentes de tout âge ; on précise maintenant que s'il y a un vicaire, ces femmes devront avoir quarante ans révolus »⁸⁹.

Le troisième concile eut lieu du quatorze au vingt-et-un mai 1863⁹⁰. Les décrets des deux premiers Conciles furent renouvelés et confirmés⁹¹ « afin de les maintenir ainsi dans toute leur vigueur, contre la malheureuse tendance de la plupart des hommes à mettre en oubli, et à négliger les lois les plus

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ *M.E.Q.*, t. 1, statut VIII, 392.

⁸⁸ GRISÉ, *Conciles provinciaux*, 158.

⁸⁹ Ibid.

⁹⁰ Ce concile fut convoqué par monseigneur Charles-François Baillargeon, administrateur du diocèse de Québec Il avait pris la relève suite à la paralysie de monseigneur Turgeon. Voir la liste des participants au troisième concile provincial dans *ibid.*, 365-366 et la liste des décrets dans *ibid.*, 384.

⁹¹ Voir *ibid.*, 215.

sages, et les plus saintes règles »⁹² Les autres décrets portaient sur la vénération envers la Vierge Immaculée, celle pour le Souverain Pontife et sur la fonction épiscopale⁹³.

Après avoir rappelé que selon le Concile de Trente, c'est à l'évêque que revient la charge de gouverner dans l'Église, les Pères exhortent ceux qui sont revêtus de la dignité épiscopale à mener une vie simple et à vivre de telle façon qu'ils ne s'attirent aucune critique. L'évêque doit s'efforcer d'enrayer les abus ; il lui appartient, à lui le premier, de prêcher l'Évangile et de faire donner des retraites aux fidèles, surtout dans les paroisses de campagne⁹⁴.

Il fut également question de la façon de subvenir aux besoins du clergé dans le Haut-Canada et de l'habit ecclésiastique pour cette même région.

Les prêtres du Canada-Ouest pourront donc porter, au lieu de la soutane, la "soutanelle" qui ne descend qu'en bas du genou mais se porte également avec le col romain⁹⁵.

Cinq ans plus tard, au quatrième concile provincial⁹⁶, on retrouvait des décrets traitant des mauvais livres, c'est-à-dire des livres « antireligieux ou immoraux »⁹⁷, des mauvais journaux, ceux « qui attaquent l'autorité de l'Église, ses droits, sa doctrine, ses institutions ou sa morale, ou bien qui soutiennent les

⁹² C.F. BAILLARGEON, « Mandement pour la publication du troisième concile de la province de Québec », dans H. TÊTU et C.O. GAGNON (dir.), *Mandements, lettres pastorales et circulaires des évêques de Québec*, tome 4 : 1850-1871, Québec, Imprimerie générale A. Côté et C^{ie}, 1888, 526.

⁹³ Par exemple, la visite pastorale de l'évêque à chaque année, la retraite annuelle avec leurs prêtres, et la responsabilité des séminaristes.

⁹⁴ GRISÉ, *Conciles provinciaux*, 217.

⁹⁵ Ibid.

⁹⁶ Ce quatrième concile provincial, convoqué par monseigneur Baillargeon devenu archevêque de Québec en 1867, se tint du 7 au 12 mai 1868. Voir la liste des participants dans *ibid.*, 367-369 et la liste des décrets dans *ibid.*, 385.

⁹⁷ « Le huitième décret, le suivant, traitait des "mauvais livres et des mauvais journaux". Ayant souligné l'impact de ces moyens de diffusion, les évêques se montrent d'autant plus inquiets de l'influence "sur les mœurs et la religion" de certains imprimés. Ils demandent donc au clergé de prêcher d'abord que l'Église et surtout le Pape ont reçu "de Dieu lui-même" le pouvoir de défendre la lecture des livres antireligieux ou immoraux, et ensuite de rappeler que la loi de l'index oblige tous les fidèles et, de façon générale, sous peine de faute grave.

S'il se trouvait des catholiques s'obstinant à lire ou à conserver des livres condamnés, on leur refuserait les sacrements. Les confesseurs devront cependant être prudents et demander au besoin l'avis de leur évêque. Toutefois, la plupart des romans sont jugés répréhensibles. Car, ou bien ils sont irréligieux ou bien ils sont immoraux. Ou enfin, ce sont des romans d'amour et alors ils ne sont pas sans péril, surtout pour la jeunesse » (*ibid.*, 241).

erreurs condamnés par l'Église »⁹⁸, l'usure, le divorce, les sociétés secrètes⁹⁹, le code civil, les élections politiques et administratives, car il faut, n'est-ce pas, rappeler aux fidèles « l'obligation de voter toujours selon sa conscience “pour le plus grand bien de la religion, de la société et de la patrie” »¹⁰⁰. Les évêques présents se penchèrent également sur la question de la sainteté de vie des clercs, l'Église et le Souverain Pontife, la foi et la profession de foi, le culte divin. Dans le décret traitant du culte divin, les évêques disaient qu'il

ne suffit pas que les fidèles sachent ce que l'Église enseigne sur le culte des saints, les pasteurs doivent voir à ce que l'expression de cette croyance chez le peuple demeure digne. Il faut bannir toute superstition, toute prière de demande que la morale réprouverait. Il faut que les fêtes des saints ne soient pas l'occasion d'abus et d'enivrements et qu'en somme, tout s'y passe dans l'ordre et la dignité¹⁰¹.

Dans ce même décret, « les évêques [désiraient] aussi que les églises soient tenues proprement, qu'elles ne servent pas à des réunions profanes et qu'on n'y pénètre que modestement vêtu »¹⁰². La dîme, la division de la province ecclésiastique, ainsi que l'invocation et la vénération de la Vierge Immaculée furent aussi à l'ordre du jour.

Le cinquième concile eut lieu du dix-huit au vingt-sept mai 1873¹⁰³. L'accent fut mis sur l'infailibilité pontificale et sur l'obéissance des prêtres à leurs supérieurs. Il faut se rappeler que ce concile eut lieu quelques années seulement après le premier concile du Vatican (1869-1870). Les décrets promulgués portèrent sur la vocation à l'état cléricale, l'exercice de la médecine défendu aux clercs, sur le bon renom du clergé à préserver, alors qu'on

⁹⁸ « Quant aux mauvais journaux, on doit leur appliquer des règles semblables. Doivent être considérés comme “mauvais” les journaux qui attaquent l'autorité de l'Église, ses droits, sa doctrine, ses institutions ou sa morale, ou bien qui soutiennent les erreurs condamnées par l'Église, spécialement celles contenues dans le Syllabus et l'encyclique *Quanta Cura*. Enfin, pour mieux détourner les fidèles de ces écrits “pervers”, les curés devront encourager les bibliothèques paroissiales et les journaux qui suivent les vrais principes catholiques » (ibid., 241).

⁹⁹ L'ordonnance sur les sociétés secrètes « rappelle le décret XIV du premier concile et répète que sont considérées comme condamnées par l'Église toutes les associations qui imposent à leurs membres de garder le secret, même si ce n'est pas sous serment, et celles qui poursuivent une fin mauvais, c'est-à-dire qui luttent contre l'Église, le gouvernement ou la société en général. Sont aussi condamnées les associations où l'on fait promettre aux membres d'obéir aveuglément aux ordres d'un chef » (ibid., 242-243).

¹⁰⁰ Ibid., 242.

¹⁰¹ Ibid., 240.

¹⁰² Ibid.

¹⁰³ Les cinquième, sixième et septième conciles provinciaux furent convoqués par monseigneur Elzéar-Alexandre Taschereau. Voir la liste des participants au cinquième concile dans ibid., 370-371 et la liste des décrets dans ibid., 386.

« demande aux prêtres “de rejeter tout orgueil, toute colère, toute impureté et toute avarice”, de se montrer prudents dans leurs paroles et dans leurs actes “si bien que par leurs conversations ou par manque de sobriété, ils ne donnent pas occasion de critiques” »¹⁰⁴.

Il y avait aussi des décrets sur les ecclésiastiques et l'étude de la théologie, l'enseignement du catéchisme, les Saintes-Huiles, la vacance d'un siège épiscopal, le luxe, alors qu'on « dénonce une tendance générale à des dépenses exagérées, surtout dans le vêtement »¹⁰⁵, la tempérance, ce décret qui « exhorte les curés à combattre l'ivrognerie, principalement en encourageant les sociétés de tempérance, en empêchant la multiplication des “licences” et en veillant à ce que ceux qui en jouissent déjà ne tolèrent aucun désordre dans leur établissement »¹⁰⁶. Les curés devaient même refuser « l'absolution aux conseillers municipaux qui donneraient des permis trop facilement ou fermeraient les yeux sur les débits clandestins »¹⁰⁷. Des décrets furent élaborés sur les écoles protestantes, les mariages devant un ministre protestant, les écrivains catholiques, le libéralisme catholique, la liberté de l'Église et ses relations avec le pouvoir civil, ainsi que les élections :

Le texte demande aux curés d'être clairs et brefs sur cette question et de rappeler aux fidèles leur devoir assez longtemps avant les élections, lorsque la lutte n'est pas encore pleinement engagée. Les curés demanderont aux fidèles d'éviter les parjures, la violence, l'intempérance et la vente des votes. Après les élections, ils exhorteront les adversaires à se pardonner mutuellement les injures qu'ils auraient pu se dire¹⁰⁸.

Les évêques se penchèrent à nouveau sur les cas réservés et leur absolution. Depuis le premier concile provincial, le concubinage public et la location de logements aux prostituées constituaient les deux péchés dont l'absolution était réservée à l'évêque. Au cinquième concile, le parjure fut ajouté à la liste des cas réservés¹⁰⁹.

¹⁰⁴ Ibid., 275.

¹⁰⁵ « On y dénonce une tendance générale à des dépenses exagérées, surtout dans le vêtement. On déplore l'émulation qui fait que des familles, qui ont à peine de quoi vivre, s'endettent pour s'habiller comme les autres jusqu'à ne plus pouvoir remettre l'argent emprunté. Pour fuir leurs créanciers, des familles se sont expatriées aux États-Unis. Le décret reproche également aux gens plus à l'aise de permettre des dépenses qu'ils pourraient mieux utiliser à aider ceux qui sont dans le besoin » (ibid., 279).

¹⁰⁶ Ibid., 280.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Voir ibid., 273. « Les Pères visaient ici surtout l'abus du serment qui se faisait en temps d'élection ».

Cinq ans plus tard, au sixième concile provincial de Québec¹¹⁰, les Pères adoptèrent vingt-neuf décrets parmi lesquels celui sur la profession de foi, les droit de l'Église, les règlements pour les clercs qui devaient porter la tonsure et non la barbe. En voyage, ils devaient revêtir au moins l'habit noir qui descend jusqu'aux genoux et le collet romain¹¹¹. D'autres décrets traitèrent des études philosophiques, du mariage et des causes matrimoniales, des parrains de confirmation¹¹², de l'éducation des enfants par les parents¹¹³, de l'éducation des jeunes filles dans les couvents¹¹⁴, du jeûne et de l'abstinence, de l'avortement et des dangers que peut courir la foi¹¹⁵. Il fut également « défendu, sous peine d'excommunication, de lire ou de conserver des livres qui contredisent la foi catholique »¹¹⁶. Un décret qui retient notre attention est celui sur les dangers pour la morale qui condamnait

encore une fois les danses lascives comme la valse et la polka, et les sauteries. Il défend aussi les fréquentations en l'absence des parents et fait un nouvel appel à la tempérance. Il exige enfin que l'on n'organise aucune fête de charité sans la permission de l'évêque. Celles-ci ont été parfois l'occasion, dit-on, de fautes contre la morale¹¹⁷.

En 1886, lors du septième et dernier concile provincial¹¹⁸ les décrets promulgués traitaient, entre autres, de la profession de foi, l'état clérical, le testament

¹¹⁰ Ce concile eut lieu du 19 au 26 mai 1878. Voir la liste des participants dans *ibid.*, 372-373 et la liste des décrets dans *ibid.*, 387-388.

¹¹¹ Voir *ibid.*, 304.

¹¹² « Un décret est admis sur les parrains de confirmation qui doivent être des hommes pour les garçons et des femmes pour les filles, à moins qu'il y en ait deux pour chaque confirmand. Les parrains doivent être eux-mêmes confirmés et ne pas être les parents immédiats (ou le conjoint) du confirmé. Le parrain ou la marraine doit poser la main sur l'épaule droite ou tenir le bras droit du confirmé. *Acta*, 27 » (*ibid.*, note en bas de page n. 68, 306).

¹¹³ « Pour ce qui est de l'éducation des enfants, on demande aux curés de rappeler souvent aux fidèles leurs devoirs à ce sujet. On énumère même quelques règles de conduite pour les parents [...] » (voir *ibid.*, 308).

¹¹⁴ « Quant aux jeunes filles dans les couvents de religieuses, on insiste encore une fois pour orienter leur éducation d'une manière qui évitera de les sortir de leur état et de leur enlever le goût des travaux domestiques. Et dans ce but, les évêques émettent trois directives pratiques » (*ibid.*, 308).

¹¹⁵ Ces dangers sont indiqués de façon très concrète. Par exemple, les laïcs doivent éviter de discuter de religion avec les non-catholiques, ils ne doivent pas assister aux cérémonies religieuses des non-catholiques, et ils doivent demeurer à l'extérieur du temple s'ils assistent à des funérailles de non-catholiques. Les servantes ne doivent pas participer habituellement aux prières qui peuvent se faire à la maison. Elles doivent quitter leur emploi si elles ne peuvent pas pratiquer leur religion librement (voir *ibid.*, 306).

¹¹⁶ *Ibid.*, 306 (note en bas de page n. 70).

¹¹⁷ *Ibid.*, 306.

¹¹⁸ Ce septième concile eut lieu du 30 mai au 6 juin 1886. Voir la liste des participants dans *ibid.*, 374-376 et la liste des décrets dans *ibid.*, 389-390.

des clercs, la juridiction des prêtres qui pouvaient maintenant, par exemple, entendre la confession dans les paroisses avoisinantes la sienne même si celles-ci ne faisaient pas partie du même diocèse¹¹⁹, les registres paroissiaux, les pèlerinages, les écoles élémentaires¹²⁰, les sociétés de tempérance, les blasphèmes, la sépulture ecclésiastique, les mauvais livres et les mauvais journaux

On affirme, [...], que c'est avec peine que l'on constate que les mauvaises lectures, au lieu de diminuer, ne font que croître, en même temps que grandit le nombre des lecteurs et le désir effréné de tout lire. D'où le danger accru des livres qui attaquent la foi ou les mœurs. Le mal n'est pas moins grand, dit-on, dans les journaux qui, pour s'attirer des lecteurs, publient des romans en feuilletons ou « d'autres écrits qui ne font qu'exciter la concupiscence des lecteurs »¹²¹.

La franc-maçonnerie fut condamnée¹²². Les occasions de péché et les autres dangers à éviter furent également abordés dans les décrets particuliers de ce septième concile.

On demande aux fidèles de s'abstenir d'aller au théâtre où une personne désireuse de faire son salut ne peut assister à de telles représentations. Ils doivent également s'abstenir d'aller au cirque, « pour la raison qu'on y expose la vie des chevaux et que la modestie chrétienne y est souvent offensée dans les vêtements et les poses des acteurs »¹²³.

Il y a d'autres jeux, dit-on, qui bien que moins dommageables présentent aussi des dangers et des occasions de péché. Ce sont les "théâtres de société" où la participation de personnes des deux sexes engendre la familiarité et peut conduire au vice, ou à tout le moins blesser « le lis blanc de la chasteté » chez les jeunes filles¹²⁴.

De plus, les parents doivent interdire aux jeunes filles les promenades en raquettes et les glissades. Les hommes et les jeunes gens doivent, quant à eux, éviter de fréquenter les clubs, « car cela tend à les éloigner de la famille et à prolonger le jeu durant la nuit »¹²⁵.

2.2 — Autres conciles provinciaux

Durant cette même époque, quatre provinces ecclésiastiques se prévalurent le droit de se réunir en concile provincial : soit Halifax, Toronto, Saint-Boniface et Montréal.

¹¹⁹ Pour plus de détails sur ce décret, voir *ibid.*, 336.

¹²⁰ Les catholiques ne peuvent collaborer financièrement à la construction d'écoles protestantes, à moins qu'ils n'y soient forcés par la loi. *Ibid.*, 343.

¹²¹ *Ibid.*, 330.

¹²² Voir *ibid.*, 338-339.

¹²³ *Ibid.*, 345.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, 345-346.

Au concile provincial de Halifax¹²⁶, en septembre 1857, la pureté de la foi et l'éducation chrétienne firent l'objet d'une attention particulière de la part des Pères du concile. L'avortement fut condamné, tout comme il l'avait été au sixième concile provincial de Québec. Certains décrets interdirent aux prêtres d'assister à des courses de chevaux, d'aider leur famille avec l'argent de la paroisse, de s'absenter du presbytère sans la permission de l'évêque¹²⁷. Les prêtres devaient porter la soutane pour des cérémonies religieuses et la barrette pour la messe, si possible. Ils ne devaient pas porter de vêtements séculiers. Bref, les prêtres devaient mener une vie exemplaire.

Durant le concile provincial de Toronto¹²⁸, en octobre 1875, les Pères démontrèrent un intérêt particulier pour le soin pastoral des malades et de prisonniers. Ils se penchèrent également sur les problèmes entourant l'éducation catholique et sur le soutien financier des prêtres (pension, revenu, honoraires)¹²⁹.

Le concile provincial de Saint-Boniface¹³⁰ eut lieu en 1889, soit trois ans après le septième et dernier concile provincial de Québec. Deux faits sont à noter : ce concile fut le premier rassemblement législatif pour les évêques de l'Ouest du Canada, et tous les participants étaient des membres de la Congrégation des Oblats de Marie Immaculée¹³¹. Les Pères de ce concile y interdirent les mariages mixtes et déterminèrent l'âge de la première communion, soit dix ans pour les filles et onze ans pour les garçons¹³². Ils déclarèrent également que les enfants ne devaient pas fréquenter

¹²⁶ Le concile provincial d'Halifax convoqué par monseigneur William Walsh, premier archevêque du lieu, se tint du 8 au 15 septembre 1857 et réunissait, entre autres, les évêques des diocèses d'Halifax, de Charlottetown, d'Arichat et de Saint-Jean, Nouveau-Brunswick.

¹²⁷ MORRISEY, « Ecclesiastical Particular Law », 144.

¹²⁸ Le concile provincial de Toronto fut convoqué par monseigneur Joseph-John Lynch, premier archevêque de Toronto. Les évêques des diocèses de Toronto, London, Hamilton, Kingston, ainsi que le vicaire apostolique du Canada septentrional, comptèrent au nombre des participants qui se réunirent du vingt-six septembre au trois octobre 1875.

Le vicariat apostolique du Canada septentrional devint, plus tard, le diocèse de Peterborough. Voir PREMIER CONCILE PLÉNIER DE QUÉBEC (LE), *Travaux préparatoires, séances solennelles, fêtes religieuses et civiles, allocutions, 10 septembre - 1^{er} novembre 1909*, Québec, Imprimerie de « L'Événement », 1910, 12 (= PREMIER CONCILE PLÉNIER DE QUÉBEC).

¹²⁹ MORRISEY, « Ecclesiastical Particular Law », 144.

¹³⁰ Ce fut monseigneur Alexandre-Antoin Taché, archevêque de Saint-Boniface, qui en convoqua le premier concile provincial. Les évêques des diocèses de Saint-Boniface et de Saint-Albert, ainsi que les vicaires apostoliques de Colombie Britannique et d'Athabasca-McKenzie, accompagnés de leur auxiliaire, participèrent au concile provincial de Saint-Boniface qui eut lieu du seize au vingt-quatre juillet 1889.

¹³¹ Voir MORRISEY, « Ecclesiastical Particular Law », 145.

¹³² CONCILE PROVINCIAL DE SAINT-BONIFACE (LE), *Acta et decreta primi Concilii provinciae Sancti Bonifacii*, Saint-Boniface, [s.n.], 1889, décret IX – *Decretum de sacramentis*, 15.

l'école publique. La permission devait être obtenue de l'évêque avant de procéder à la construction d'une église ou avant de contracter une dette. Il faut noter que pour la première fois dans la législation, il y avait « une prescription à l'effet que les biens d'Église devaient être suffisamment assurés »¹³³.

Le dernier concile provincial au Canada, avant le Concile plénier de Québec, fut celui de Montréal¹³⁴. Les auteurs s'accordent pour dire que les décrets promulgués étaient du même genre que ceux des autres conciles provinciaux¹³⁵. Ce concile ne semble pas être considéré comme le plus original étant donné que la grande majorité de ses deux cent soixante-quinze décrets était une reproduction de ceux des conciles provinciaux de Québec.

Ces onze conciles provinciaux ne firent pas de révélations retentissantes mais les décrets promulgués à la suite de chacun de ces conciles nous donnent un aperçu de la société dans laquelle ils furent élaborés. Ces conciles provinciaux permirent aux évêques de se réunir et de travailler ensemble à bâtir la vie de l'Église au Canada et furent, en quelque sorte, les précurseurs au seul et unique Concile plénier qui allait rassembler tous les évêques canadiens en 1909.

3 — *Le Concile plénier de Québec (1909)*

Lors des travaux préparatoires au Concile plénier de Québec, des projets de décrets furent élaborés. Suite à un examen minutieux et à de laborieuses discussions, ces décrets furent révisés et regroupés dans un volume de 781 pages qui fut remis aux évêques et aux archevêques pour leurs commentaires. « L'avis unanime fut d'en abrégier le volume, sans toutefois ôter à l'œuvre son caractère encyclopédique, qui devait en faire un compendium de doctrine, de droit canon, de discipline et de liturgie approprié aux conditions de l'époque et du pays »¹³⁶. Un travail de réduction fut entrepris et la seconde édition des *Schemata* contenait 289 pages¹³⁷.

¹³³ MORRISEY, « Ecclesiastical Particular Law », 145.

¹³⁴ Ce concile eut lieu du 29 septembre au 9 octobre 1895. Les évêques présents venaient des diocèses de Montréal, Saint-Hyacinthe, Valleyfield et Sherbrooke. Le Père Abbé du Monastère Notre-Dame du Lac, Oka, comptait également au nombre des Pères de ce concile.

¹³⁵ Voir MORRISEY, « Ecclesiastical Particular Law », 145.

¹³⁶ PREMIER CONCILE PLÉNIER DE QUÉBEC, 20.

¹³⁷ Ce paragraphe est largement inspiré du chapitre II d'*ibid.*, 16-23.

Lorsque les évêques et archevêques furent convoqués pour le premier Concile plénier du Canada, monseigneur Louis-Nazaire Bégin, archevêque de Québec, écrivit :

Les délibérations conciliaires d'un épiscopat ne portent pas sur des choses purement matérielles ; elles ne provoquent pas les tumultes ; elles n'excitent pas les passions mauvaises et les vilaines convoitises qui exercent tant d'empire dans les affaires du monde. Elles ont pour but de corriger les erreurs, de réprimer les abus, de signaler les dangers que courent la foi et la morale, de régler tout ce qui concerne le culte et la discipline, de détruire le vice, de répandre partout les saines idées et de mettre en honneur la pratique des vertus chrétiennes. Moraliser et sanctifier les individus, les familles, la société : tel est le noble dessein qui les inspire et qu'elles poursuivent sous les regards de Dieu, dans le calme de la réflexion, dans le recueillement de la prière, et dans les sentiments de la divine charité. Dieu bénira ces apostoliques travaux, Nous en avons la ferme assurance¹³⁸.

Ce qui résume assez bien l'état d'esprit qui régnait au moment de travaux conciliaires.

Au total, six cent quatre-vingt-huit décrets¹³⁹ furent ratifiés en séance solennelle et soumis au Saint-Siège qui donna la permission de les publier et de les promulguer le trente avril 1911. Ces décrets sont groupés sous seize grands titres : (1) des doctrines de la Foi ; (2) des erreurs principales à signaler ; (3) des divers grades des Clercs ; (4) de l'institution des Clercs ; (5) des devoirs des Clercs ; (6) des Religieux ; (7) de l'éducation catholique de la jeunesse ; (8) de l'instruction chrétienne du peuple ; (9) de l'accroissement de la piété dans le peuple ; (10) des divers devoirs des laïques ; (11) des Sacrements ; (12) du culte ; (13) des lieux sacrés ; (14) des œuvres pies ; (15) des biens ecclésiastiques ; et (16) des jugements ecclésiastiques. Ces 688 décrets couvraient une multitude de sujets¹⁴⁰, parmi lesquels les sociétés défendues¹⁴¹, les péchés réservés¹⁴² et les erreurs principales à éviter. Pour ne citer qu'un exemple d'erreurs à éviter, le Concile rappelait que la

¹³⁸ Ibid., 26.

¹³⁹ Une liste des décrets « sanctionnés et proclamés à la dernière session solennelle » peut être trouvée dans *ibid.*, 274-276.

¹⁴⁰ Ibid.

¹⁴¹ Ces décrets ne contenaient pas de législation nouvelle mais reprenaient l'enseignement du Saint-Siège. Le seul point particulier est le recours au Délégué Apostolique dans les cas d'inscription à une société défendue (voir *ibid.*, 93-94).

¹⁴² « Quand un péché est réservé *ratione sui* dans un diocèse canadien, l'évêque est censé dire implicitement, sinon explicitement : il nous est réservé si le pénitent connaît la réserve » (G. ARBOUR, *Le droit canonique particulier au Canada*, Ottawa, Éditions de l'Université d'Ottawa, 1957, 94 [= ARBOUR, *Droit canonique particulier*] ; PREMIER CONCILE PLÉNIER

théologie morale enseigne que la divination spiritiste ou hypnotiste est un péché mortel de superstition et le Concile ajouta l'obligation de consulter son Ordinaire ou son confesseur avant d'assister aux séances de spiritisme¹⁴³. Certains de ces décrets réglementaient la vie des clercs et leurs devoirs. Pour n'en citer que quelques-uns : il y avait la messe *pro populo* que les curés étaient dispensés de célébrer à la fête de l'Annonciation, à la Fête-Dieu et à la Saint-Pierre et Saint-Paul¹⁴⁴, la visite paroissiale annuelle¹⁴⁵, la résidence des vicaires qui n'avaient plus à demander au curé la permission de s'absenter de la paroisse et la visite pastorale de l'évêque¹⁴⁶. Il y avait aussi le décret sur le costume ecclésiastique :

Partout où l'usage général est de porter la soutane en public, nous voulons que cet usage soit conservé... Là où l'usage contraire existe, à la maison ou en public, nous voulons que les clercs portent toujours des habits modestes, de couleur noire et descendant aux genoux, et qu'ils n'enlèvent jamais le collet romain¹⁴⁷.

Les prêtres qui possédaient la faculté d'entendre les confessions dans leur diocèse avaient également la juridiction pour confesser tout autre prêtre ainsi que les personnes qui habitaient au presbytère, parents ou serviteurs¹⁴⁸. Les prêtres ne devaient pas se mêler de politique¹⁴⁹ et il leur était défendu de « poursuivre les laïcs en cour civile, du moins au sujet de dettes à l'Église »¹⁵⁰. La question de l'entourage du prêtre, bien que discutée lors des conciles provinciaux, revint à l'ordre du jour de ce concile.

Sanctionnant l'usage et la loi du premier concile provincial de Québec (1851), le décret 218b du Concile plénier a défini que l'aïeule, la mère, la sœur et la tante d'un prêtre peuvent demeurer avec lui au presbytère. Mais ces personnes doivent avoir l'âge canonique, si d'autres prêtres vivent dans la maison »¹⁵¹.

DE QUÉBEC [LE], *Acta et decreta Concilii Plenarii Quebecensis Primi*, Québec, Typis L'action sociale limitée, 1912, décret 482, 370-371 [= CPQ]).

¹⁴³ DESROCHERS, *Premier Concile plénier*, 17.

¹⁴⁴ Voir ARBOUR, *Droit canonique particulier*, 70.

¹⁴⁵ CPQ, décret 130, 176.

¹⁴⁶ Décret 101 — Dans la mesure du possible et en temps opportun, que l'Évêque se rende même dans les lieux qu'il a fait visiter par son délégué : pour obtenir plus facilement ce but, il sera utile de diviser le diocèse en régions, qui seront visitées successivement, de telle sorte que tout le diocèse soit visité dans une période de quatre ans (ARBOUR, *Droit canonique particulier*, 51 ; CPQ, décret 101, p.161).

¹⁴⁷ ARBOUR, *Droit canonique particulier*, 30 ; CPQ, décret 215, 214-215.

¹⁴⁸ Voir ARBOUR, *Droit canonique particulier*, 92 ; CPQ, décret 484, 371.

¹⁴⁹ Voir DESROCHERS, *Premier Concile plénier*, 152 ; CPQ, décret 233, 222.

¹⁵⁰ DESROCHERS, *Premier Concile plénier*, 152 ; CPQ, décret 226, 219.

¹⁵¹ ARBOUR, *Droit canonique particulier*, 28-29 ; CPQ, décret 218b, 216. La section (a) de ce décret parlait de la nécessité des portes de parloir vitrées et la défense de sortir seul avec

Alors que certains décrets réglementaient la vie des clercs, d'autres s'adressaient plus particulièrement aux laïcs. Ces décrets régissaient aussi bien leur éducation¹⁵² et leurs loisirs que leur vie spirituelle¹⁵³. En effet, l'un des décrets défendait d'ouvrir les tavernes les dimanches et les jours de fêtes¹⁵⁴, alors qu'un autre déclarait qu'il ne devait pas y avoir de divertissement payant les dimanches et jours de fêtes¹⁵⁵. De plus, les catholiques ne devaient point prendre part à des amusements taxés au profit des œuvres pies organisés par des non-catholiques¹⁵⁶.

Le Concile plénier légiféra également en matière de sacrements. Par exemple, pour ce qui est du mariage, les prêtres devaient prêcher deux fois par année sur ce sujet¹⁵⁷, les registres de mariage devaient être signés tant par les nouveaux époux que par les témoins¹⁵⁸, un avis de mariage devait « être envoyé aux curés propres des époux qui se sont mariés en dehors de leur paroisse »¹⁵⁹, etc. Un décret exigeait que les futurs époux qui voulaient contracter un mariage mixte devaient promettre de ne pas se présenter devant un ministre « hérétique »¹⁶⁰. Quant au baptême, le Concile plénier exhorta « les curés à demander aux fidèles de ne pas retarder le baptême de leurs enfants au-delà du troisième jour après la naissance »¹⁶¹.

Les six cent quatre-vingt-huit décrets du Concile constituèrent le guide principal pour la législation particulière au Canada, législation qui s'adressait avant tout aux catholiques latins. Certains de ces décrets furent automatiquement

une femme, et la section (c) était la défense d'admettre les servantes à table (voir DESROCHERS, *Premier Concile plénier de Québec*, 63 ; CPQ, décret 218a et 218c, 216-217).

¹⁵² Le décret 305b exigeait que les universités érigent une chaire de Droit public de l'Église et que les exigences académiques soient les mêmes que pour les autres matières (DESROCHERS, *Premier Concile plénier*, 153 ; CPQ, décret 305b, 273). Le décret 307 prohibait la fréquentation des universités hétérodoxes et le décret 308 exigeait que les étudiants catholiques dispensés du décret 307 soient confiés à la vigilance et la direction d'un prêtre déterminé (DESROCHERS, *Premier Concile plénier*, 153 ; CPQ, décrets 307-308, 274-275).

¹⁵³ Le décret 575 urgeait la pratique du *mois du Rosaire* (DESROCHERS, *Premier Concile plénier*, 155 ; CPQ, décret 575, 416-417).

¹⁵⁴ DESROCHERS, *Premier Concile plénier*, 154 ; CPQ, décret 403, 323-324.

¹⁵⁵ DESROCHERS, *Premier Concile plénier*, 155 ; CPQ, décret 544, 402.

¹⁵⁶ DESROCHERS, *Premier Concile plénier*, 155 ; CPQ, décret 636, 451-452.

¹⁵⁷ CPQ, décret 534, 395-396.

¹⁵⁸ CPQ, décret 524, 390-391.

¹⁵⁹ DESROCHERS, *Premier Concile plénier*, 154 ; CPQ, décret 525, 391.

¹⁶⁰ DESROCHERS, *Premier Concile plénier*, 154 ; CPQ, décret 529, 393. Le Concile plénier imposait une excommunication réservée à l'Ordinaire pour tous les catholiques qui contractaient mariage devant un ministre d'une secte non catholique (ARBOUR, *Droit canonique particulier*, 144 ; CPQ, décret 533b, 395). Il semble que ce décret était invalide parce que cette censure était déjà réservée au Saint-Siège.

¹⁶¹ ARBOUR, *Droit canonique particulier*, 83 ; CPQ, décret 452, 354-355.

abolis après la promulgation du Code de 1917 alors que d'autres continuèrent d'être en vigueur après 1918¹⁶². Fait intéressant à souligner, il semblerait que certains de ces décrets seraient encore valides aujourd'hui, même si c'est seulement formellement.

Conclusion

L'étude du droit canonique particulier au Canada permet de reconstituer la trame de notre riche héritage religieux. Retourner dans le temps à la recherche de ses origines donne également l'occasion de connaître et de mieux comprendre l'évolution des réunions d'évêques à la suite desquelles furent promulgués les décrets s'adressant aux fidèles du Canada. Au cours des années qui suivirent le concile plénier de Québec, les évêques canadiens continuèrent à se réunir et ce sont ces réunions qui menèrent à la fondation de la Conférence catholique canadienne (1943).

Le deuxième concile du Vatican (1962-1965) redonna un souffle de vie à l'Église universelle mais aussi à l'Église particulière. Suite au décret sur la charge pastorale des évêques dans l'Église *Christus Dominus* qui demandait « de pourvoir d'une manière plus adaptée au bien des fidèles, chacun selon sa condition »¹⁶³, les évêques canadiens, en collaboration avec les membres de la Société canadienne de droit canonique, travaillèrent sans relâche dans les années qui suivirent le Concile afin de mettre en œuvre les documents conciliaires selon les besoins des fidèles du Canada. Ces années de recherches et de labeur menèrent à la promulgation de nouveaux décrets particuliers.

En 1983, suite à la promulgation du Code de droit canonique, une nouvelle période intense d'activité canonique fut amorcée. Les conférences des évêques reprirent à nouveau un rôle actif en matière de législation. En effet, le canon 455, § 1 stipule que la conférence épiscopale peut porter des « décrets généraux pour les affaires dans lesquelles le droit universel l'a prescrit, ou lorsqu'une décision particulière du Siège apostolique l'a déterminé de sa propre initiative ou à la demande de la conférence elle-même »¹⁶⁴. Les décrets promulgués par la Conférence des évêques catholiques du Canada firent l'objet de questionnements, de consultations et de recherches extensives avant d'être promulgués dans la forme que nous connaissons.

¹⁶² Pour consulter la liste des principales lois en vigueur après la promulgation du Code de 1917, voir DESROCHERS, *Premier Concile plénier*, 150-155.

¹⁶³ *CD*, n° 16, 311-312.

¹⁶⁴ *CIC*, canon 455, § 1.

La mise en application du Code de droit canonique de 1983 mena à l'élaboration d'un droit particulier à l'Église au Canada. Tout comme ce fut le cas depuis la fondation de l'Église au Canada, les évêques canadiens avaient désiré, une fois de plus, répondre aux besoins des fidèles de notre pays en promulguant des lois particulières aux conditions de temps, de lieu et de culture.

DIVORCED AND REMARRIED IN THE EASTERN ORTHODOX CHURCHES

LORENZO LORUSSO* – GEORGE GALLARO**

SUMMARY — The concept of *oikonomia*, as a pastoral discretion of showing leniency with regard to giving exceptions against the strict observance of the letter of the law based on the divine philanthropy and exercised through the Church in matters for salvation of the souls and for the general good, is of great importance in the life of the Eastern Orthodox Churches. Its application on matters of divorce and remarriage of those within the Orthodox Church has really caught the attention of many Churches, especially the Catholic Church, in the wake of mounting marriage problems. However, it should be noted that it is the Orthodox theology of marriage that allows the freedom to apply the principle of economy in solving pastoral issues arising from divorce and remarriage.

RÉSUMÉ — Le concept de l'*oikonomia*, basé sur la philanthropie divine et exercé par l'Église en vue du salut des âmes et pour le bien général, est reconnu comme une discrétion pastorale quant à la suspension d'une application absolue et stricte de la loi. Ce concept est d'une grande importance dans la vie des Églises orthodoxes orientales. Son application, en cas de divorce et de remariage des fidèles au sein de l'Église orthodoxe, a attiré l'attention de nombreuses Églises, en particulier l'Église catholique, dans le sillage de la montée des problèmes de mariage. Toutefois, il convient de noter que c'est la théologie orthodoxe sur le mariage qui permet la liberté d'appliquer le principe de l'économie dans la résolution des problèmes pastoraux découlant du divorce et du remariage.

Introduction

It is not our intention to present here the basic texts of the Orthodox Churches and how they interpret them in explaining their tenet and praxis in

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matter of divorce and remarriage. We rather prefer to examine the data, that is, how it is practically possible to dissolve a marriage through divorce, in spite of its indissolubility, and to proceed in entering a new marriage. By “Eastern Orthodox Churches,” we mean the Churches sharing the Byzantine tradition of Constantinople that formally do not enjoy full communion with the Catholic Church since the 1054 separation—though this date has a symbolic connotation, as these Churches already developed their own spiritual dimension at the times of the undivided Christianity. Specifically, the Eastern Orthodox Churches are those communities which in their sacramental and disciplinary life are regulated by the Sacred Canons of the first seven ecumenical councils (Nicaea I, Constantinople I, Ephesus, Chalcedon, Constantinople II, Constantinople III, Nicaea II). At the present, the only serious controversy with these Churches is the exercise of the petrine ministry.¹

The Eastern Orthodox Churches form the largest of the four communions of Eastern Churches. We also have the “Oriental Orthodox Churches,”² that is, those Churches that did not receive the Council of Chalcedon (451), and the (Assyrian) Church of the East, which did not receive the Council of Ephesus (431). All the above-mentioned Churches have true sacraments and apostolic succession but are not in full communion with one another. Finally, there are the Eastern Catholic Churches formed in the second millennium of groups from all the above Churches which reestablished communion with Rome while retaining their own liturgy, theology, spirituality and discipline.

Both Catholic and Orthodox traditions recognize the sacramental character of marriage and the distinction between natural and sacramental marriage. Furthermore, both traditions retain the ecclesiastical competence in

¹ The Autocephalous Churches of: Constantinople, Alexandria, Antioch, Jerusalem, Moscow (Russia), Belgrade (Serbia), Bucharest (Romania), Sofia (Bulgaria), Tbilisi (Georgia), Nicosia (Cyprus), Athens (Greece), Warsaw (Poland), Tirana (Albania), Prague (Czech & Slovak Republics), and Washington (Orthodox Church in America); the Autonomous Churches of: Mount Sinai, Finland, Japan, China, Estonia; the Canonical Churches under Constantinople: American Carpatho-Russian Orthodox Diocese of the USA, the Ukrainian Orthodox Church of the USA & Diaspora, the Albanian Orthodox Diocese of America, and the Ukrainian Orthodox Church of Canada; and the Churches of Irregular Status of: the Ukrainian Orthodox Church – Kiev Patriarchate and Ukrainian Autocephalous Orthodox Church, the Belarusian Autocephalous Orthodox Church, the Macedonian Orthodox Church, and the Old Calendar Orthodox Churches. See Ronald ROBERSON, *The Eastern Christian Churches: A Brief Survey*, Rome 2008; Enrico MORINI, *La Chiesa Ortodossa*, Bologna 1996; Paolo SINISCALCO, *Le Antiche Chiese Orientali*, Roma 2005; Luciano BERTAZZO (ed.), *Credere Oggi: Le Antiche Chiese Orientali*, Padova 2005; Nikolaus WYRWOLL (ed.), *Orthodoxia 2014-2015*, Regensburg 2014.

² The Armenian Apostolic Church, the Coptic Orthodox Church, the Ethiopian Orthodox Tewahedo Church, the Syrian Orthodox Church of Antioch, the Malankara Orthodox Syrian Church, and the Eritrean Orthodox Church.

matrimonial matters and the special divine strength for Christians entering marriage. Lastly, both traditions acknowledge the indissolubility of Christian marriage.³ A real difficulty in analyzing the pastoral praxis of the Orthodox Churches on matrimonial matters is the seemingly lack of clarity, heterogeneous terminology, and different theological sensibilities. Furthermore, one may notice a different perception on tradition, discipline and pastoral praxis.⁴

When we deal with the common Orthodox doctrine on indissolubility of marriage, divorce, and remarriage,⁵ we are beset by doubt to speak of a common doctrine or a single Church praxis. In this essay we do not pretend to offer an exhaustive answer to the question. The first difficulty is the fact that in the past only a few Orthodox authors presented a more or less coherent reflection on matrimonial issues, and even at the present the quantity and quality of theological and canonical studies are relatively scanty.

Sound Orthodox authors' reflection begins around the 19th century and, quite often, as a reaction to Catholic authors' views. Not a few Orthodox theologians recognize that some aspects of Orthodox doctrine on marriage have not reached until recently the character of a finalized systematic doctrine.⁶

³ *Christian Understanding of Marriage*, by The Massachusetts Commission on Christian Unity, Boston 1990; *The Oriental Orthodox Churches in the United States*, by The National Conference of Catholic Bishops, Washington 1986; *A Guide on Catholic-Orthodox Marriages*, by The United States Catholic Conference, Washington 1998.

⁴ Cyril VASIL', "Separazione, scioglimento, nuove nozze nell'ortodossia. Orientamenti per la prassi cattolica," in *Nicolaus* 37 (2010) 225-246; Cyril VASIL' – George GALLARO, "Remarriage in the Orthodox Church Challenges Catholic Church," in *Studia Canonica* 47 (2013) 119-143; George GALLARO, "Oikonomia and Marriage Dissolution in the Christian East," in *Logos* 49 (2008) 37-70; John REUMANN, "The Use of *Oikonomia* and Related Terms in Greek Sources to about AD 100," in *Ekklesiastikos Pharos* 61 (1979) 563-603; Lewis PATSAVOS, "Salvation and the Free Life of the Spirit in the Orthodox Canonical Tradition," in *Road to Emmaus* 15 (2013) 4:2-35; Sabu PANACHICKAL, "The Principle of *Oikonomia* as Pastoral Concession: Orthodox Church Perspective," in *Christian Orient* 35 (2014) 133-167; John FARIS, "Marriage in the Eastern and Western Churches," in *CLSA Proceedings of the Seventy-Sixth Annual Convention*, Washington 2015, 42-72.

⁵ "Divorce," in Nicon PATRINACOS, *A Dictionary of Greek Orthodoxy*, Pleasantville 1987, 118-121; Francesca DELPINI, *Indissolubilità matrimoniale e divorzio dal I al XII secolo*, Milano 1979, 112-122; Spyridon TROIANOS, "To Synainetiko diazygio sto Byzantion," in *Byzantiaka* 3 (1983) 9-21; Elias MELIA, "Divorce in the Orthodox Church," in *Diakonia* 10 (1975) 280-282.

⁶ Alexander SCHMEMANN, "The Indissolubility of Marriage: the Theological Tradition of the East," in William BASSET (ed.), *The Bond of Marriage: An Ecumenical and Interdisciplinary Study*, Notre Dame 1968, 97-112; John ERICKSON, "Eastern Orthodox Perspectives on Divorce and Remarriage," in William ROBERTS (ed.), *Divorce and Remarriage. Religious and Psychological Perspectives*, Kansas City 1990, 15-26; Stephanos CHARALAMBIDIS, "Marriage in the Orthodox Church," in *One in Christ* 15 (1979) 204-223; John CHRYSAGVIS, "The Sacrament of Marriage: An Orthodox Perspective," in *Studia Liturgica* 19 (1989) 17-28.

We can assert that all Orthodox authors, starting from the evangelical texts, do recognize the indissolubility of Christian marriage as one of its characteristics and present it to all Christian spouses as the ideal of their life. On assessing the stances of these Orthodox authors, it seems that the only possibility for divorce is “adultery,” while other authors with a canonical background think that divorce is admissible for various other reasons. In any case, even though Orthodox hierarchs allow the possibility of divorce and remarriage, they admit it as an exception that confirms the rule of marriage’s unity and its indissolubility.

Among Orthodox authors and hierarchs, there are also some who support a strict adherence to the indissolubility of marriage without any possibility for divorce.⁷ Therefore, there seems to be a twofold conviction in Orthodoxy. On one side, it asserts that marriage is a sacramental mystery that is wholly indissoluble;⁸ and on the other, the Church allows the possibility that two spouses may break their marriage pact and, under certain conditions, enter a second and even a third marriage for reasons such as widowhood, divorce, dissolution and separation.⁹

The celebration of a second marriage includes a penitential rite, and the priest is not allowed to participate in the wedding banquet. Furthermore, a remarried man cannot be admitted to holy orders.¹⁰ As for a third marriage, the party must be at least forty years old and childless. He is not allowed to receive Holy Communion for five years. Nevertheless, if he is thirty years old and with children, he is permitted to get married for a third time (after

⁷ Luigi BRESSAN, *Il divorzio nelle Chiese Orientali*, Bologna 1976, 40; Theodore MACKIN, *Divorce and Remarriage*, New York 1984, 123-124; Stanley HARAKAS, *Guidelines for Marriage in the Orthodox Church*, Minneapolis 1980.

⁸ Deno CONSTANTELOS, “Marriage in the Greek Orthodox Church,” in *Journal of Ecumenical Studies* 22 (1985) 21-27; Panagiotis TREMBELAS, *Dogmatique de l’Eglise Orthodoxe*, Chevetogne 1968, 3: 339-344 and 363-365; Paul EVDOKIMOV, *The Sacrament of Love*, Crestwood 1985, 181-192; Pavel EVDOKIMOV, *Il matrimonio sacramento dell’amore*, Magnano 2008, 189-198; Alexander SCHMEMMANN, *For the Life of the World: Sacrament and Orthodoxy*, Crestwood 1973, 81-91; Alkiviadis CALIVAS, “Marriage: the Sacrament of Love and Communion,” in *The Greek Orthodox Theological Review* 40 (1995) 247-275.

⁹ Elias MELIA, “Le lien matrimonial à la lumière de la théologie sacramentaire et de la théologie morale de l’Eglise Orthodoxe,” in René METZ (ed.), *Le lien matrimonial*, Strasbourg 1970, 180-197; George JOYCE, *Christian Marriage*, London 1935, 560-597.

¹⁰ John MCGUCKIN, *The Orthodox Church. An Introduction to Its History, Doctrine, and Spiritual Culture*, Malden 2008, 309-323; Alexandre NELIDOW, “Caractère pénitentiel du rite des deuxième nocés,” in Achille TRIACCA (ed.), *Liturgie et remission des pêchés*, Roma 1975, 163-177; Lewis PATSAVOS, *A Noble Task: Entry into the Clergy in the First Five Centuries*, Brookline 2007; Stefano SODARO, *Keshi: Preti Sposati nel Diritto Canonico Orientale*, Trieste 2000.

having completed the required canonical penance of four years).¹¹ In order to endorse this pastoral praxis, the Orthodox Church makes recourse to the principle of *oikonomia*, that is, the ecclesiastical possibility/feasibility in deciding individual cases with condescendence better to exercise the Lord's mercy when every spiritual and social means has failed to solve difficult situations.

1 — *Indissolubility*

Orthodox doctrine maintains that marriage is indissoluble and lifelong in conformity with the words of the Lord.¹² Indeed, for some authors, even death could not dissolve it.¹³ Orthodoxy interprets the indissolubility of marriage as moral indissolubility (*marriage be dissolved*) and not as ontological indissolubility (*marriage be dissolved by human power*).¹⁴ Therefore, divorce is seen as an exception to this principle or general rule, as a concession to the weakness and frailty of man in his imperfect state. It would appear to be a conditioned indissolubility (or solvency) of marriage since divorce is granted only in specific cases.¹⁵ Then, even for the Orthodox Church, marriage is unique and a sacrament, but if it fails, the Orthodox hierarchs wonder about the spiritual wellbeing of the spouses and the salvation of their souls. The Church can use extreme severity (*akrivia*) by not freeing the spouses from their commitment, or it can use mercy (*oikonomia*) by dissolving their marriage in order to avoid a lifelong damaging situation.

¹¹ BASILIO PETRA', *La Chiesa dei Padri. Breve introduzione all'Ortodossia*, Bologna 2007, 74-75; Constantine TSIRPANLIS, "Doctrinal *Oikonomia* and Sacramental *Koinonia* in Greek Patristic Theology and Contemporary Orthodox Ecumenism," in *Patristic and Byzantine Review* 6 (1987) 30-43.

¹² TREMBELAS, *Op. cit.*, 358-361; Timothy WARE, *The Orthodox Church*, New York 1993, 294-296; Paul EVDOKIMOV, *Orthodoxy*, New York 2011, 299-305; Bartholomeos ARCHON-DONIS, "The Problem of *Oikonomia* Today," in *Kanon* 6 (1983) 39-50.

¹³ John MEYENDORFF, *Marriage. An Orthodox Perspective*, Crestwood 1984, 54; Francis THOMSON, "Economy: An Examination of the Various Theories within the Orthodox Church, with Special Reference to the Recognition of the Validity of Non-Orthodox Sacraments," in *Journal of Theological Studies* 16 (1965) 368-429.

¹⁴ Pierre L'HUILLIER, "L'indissolubilité du mariage dans le droit et la pratique orthodoxe," in *Studia Canonica* 21 (1987) 239-260; *Idem*, "The Indissolubility of Marriage in the Orthodox Law and Practice," in Pierre HEGY (ed.), *Catholic Divorce: The Deception of Annulments*, New York 2006: 108-126; PETRA', *Op. cit.*, 73.

¹⁵ Pierre L'HUILLIER, "L'espace du principe d'économie dans le domaine matrimonial," in *Revue de Droit Canonique* 28 (1978) 51; Michael AZKOUL, "*Oikonomia* and the Orthodox Church," in *The Patristic and Byzantine Review* 6 (1987) 65-79.

Death, then, is not understood in its biological sense only but also in its moral/religious one. Thus, if the end of a marriage is caused by moral/religious death, the divine precept is not violated. This is due to the fact that the spouses' separation happens by itself; in other words, if what constitutes marriage is brought to an end, the goal of marriage cannot be met, and marriage *de facto* does not exist. Therefore, marriage is not dissolved by ecclesiastical authority – the authority only takes notice of the *status quo*. In the last analysis, the marriage is dissolved by God Himself.

As for the form of marriage, the sacred rite, that is, the sacramental blessing by the priest, constitutes for the Orthodox Church a constitutive element of the required canonical form. The Church does not recognize civil marriage as valid for its faithful, nor does it grant a dispensation from the celebration of the sacred rite or admit the extraordinary form of the celebration of marriage.¹⁶ It would appear that for the Orthodox Church the new marriage is not a sacramental mystery, or at least “it cannot ever have the sacramental fullness of the first marriage.”¹⁷ There is then a controversy on the sacramental value of a second marriage.¹⁸ In general, a third marriage is considered without any sacramental value.¹⁹ Furthermore, the marriage of a widower is subject to canonical penance and permitted no more than twice.

2 — *Grounds for Divorce*

The grounds for the acknowledgment of a civil divorce on the part of the Church are: a) adultery, to which are assimilated a series of dishonourable behaviors; b) death, including civil death by a lifelong sentence, psychical death through an incurable disease, religious death or apostasy, and mystical death (monastic profession); and c) crimes that exclude from the Kingdom

¹⁶ John ERICKSON, *Op. cit.*, 22-25; Pierre NOAILLES (ed.), *Les Nouvelles de Léon VI le Sage*, Paris 1944, 294-296; Spyro TROIANOS, *Oi Neares Leontos VI Tou Sophos (Novels of Leo VI)*, Athens 2007, 254-255.

¹⁷ George GALLARO, “*Oikonomia* and Marriage Dissolution in the Christian East,” in *Logos* 49 (2008) 37-70; Dimitrios SALACHAS, “Matrimonio e divorzio nel diritto canonico orientale,” in *Nicolaus* 1 (1973) 48-68; Amilkar ALIVISATOS, *Marriage and Divorce in Accordance with Canon Law of the Orthodox Church*, London 1948; Panteleimon RODOPOULOS, *An Overview of Orthodox Canon Law*, Rollinford 2007, 185-201.

¹⁸ Andrea PALMIERI in his *Il rito per le seconde nozze nella Chiesa Greco-ortodossa* (Bari 2007) favors the sacramental value of marriage.

¹⁹ Basilio PETRA’, “Questioni intorno al matrimonio,” in Giovanni BATTAGLIA (ed.), *L’ortodossia in Italia. Le sfide di un incontro*, Bologna 2011, 297-314.

of God (1 Corinthians 6:5-10), among which are listed a series of particularly sinful and nefarious behaviors.

The basic text for this is the Legislation of Justinian²⁰ of 542 – absorbed by the Nomocanon in Fourteen Titles,²¹ which distinguished the causes in two groups: a) *divortium iusta causa* or *cum damno* (for a just cause or with loss) and *divortium bona gratia* (by good grace/harmony). Generally this distinction is accepted by Orthodox authors as in line with tradition.

Today the situation is changed. In fact, the various Orthodox Churches in their legislation have taken the liberty of keeping a distance from the Nomocanon in Fourteen Titles.²² The distinction between divorce *bona gratia* and *cum damno* seems to be ignored and there is no longer any difference between a guilty and an innocent spouse, so that all the divorced are allowed a new marriage. Granting that not all Orthodox accept this praxis, many have recourse to the principle of economy which, because of circumstances or psychic-spiritual immaturity, could reluctantly lead to a new marriage. Equity corrects/balances the rule's rigor.²³

2.1 – *Divortium cum damno*

These grounds are based not only on adultery but also on serious attacks against marriage as a sharing of the whole life (*consortium omnis vitae*). There is high treason, understood as conspiracy against the emperor or conspiracy of silence against the same. The sentence for this crime involved the loss of all civil rights and, therefore, the social death of the guilty. Attack on the life of one's spouse's is grounds for divorce, when the threatened party has no other solution in order to have his/her life save.

Adultery is considered grounds for divorce by divine law. It occurs only when sexual union is free, conscious and intentional. There is no reason for divorce when both parties have committed adultery, when one party has been

²⁰ Alan WATSON (ed.), *The Digest of Justinian*, Philadelphia 1998, vol. I: bk. 24.

²¹ PHOTIOS I, *Nomocanon in Fourteen Titles*, in Giorgios RALLI – Michail POTLI, *Syntagma theion kai ieron kanonon*, vol. 1, 13-335. Athens 1966.

²² Cyrille VOGEL, "Application du principe de l'économie en matière de divorce dans le droit canonique oriental," in *Revue de Droit Canonique* 32 (1982) 81-100.

²³ Pierre L'HUILLIER, "L'attitude de l'Eglise orthodoxe vis-à-vis du remariage des divorcés," in *Revue de Droit Canonique* 29 (1979) 44-59; Angelo ALTAN, "Indissolubilità ed oikonomia nella teologia e disciplina orientale del matrimonio," in *Sacra Doctrina* 49 (1968) 97-120; Astrid KAPTJUN, "Divorce et remariage dans l'Eglise orthodoxe," in *Folia Canonica* 2 (1999) 105-128; George GALLARO, "Christian *Oikonomia* Revisited," in *Studia Canonica* 48 (2014) 151-169.

the cause of the other's adultery or when the innocent party has pardoned the adulterous spouse.

A man can also resort to divorce for other secondary grounds: when the wife against the husband's will takes part in banquets with other men or goes with them to baths with sexual intent; when the wife, without just cause and the consent of her husband, spends the night in another's man house; or when the wife, against her husband's will, takes part in scandalous entertainments. A woman can resort to divorce when she is induced to prostitution by her husband; when her husband publicly and without reason accuses her of adultery; or when her husband has illicit relations with another woman.

Abortion still appears among the *cum damno* grounds as contrary to divine law. Also included is disparity of cult caused by the conversion of a spouse to Christianity. In a marriage between pagans, when one of them receives baptism, the pagan party could file for divorce. A Christian spouse's abandoning of the faith is also grounds for divorce in order to defend the faith.

The last *cum damno* ground linked to the Trullan canon 53 regards the spiritual relationship. This canon prohibited the marriage of a godfather with the widowed mother of his godchild. To obtain grounds for a divorce, spouse would very often become godfathers of their own children. To stop this abuse, a *Novel* was introduced prohibiting a new marriage, even though the fact that the parent had become godfather of his own son was recognized as ground for divorce.

The husband who leaves his wife because she is guilty of adultery can enter a new marriage but only after a period of two or three years of penance. Clerics are not permitted these new marriages. Women, after being divorced for adultery, are not allowed to enter new marriages while the husbands are still alive. Husbands guilty of adultery cannot enter new marriages either. In all the other cases of divorce *cum damno*, marriages with a third person are only authorized after five years.

2.2 — *Divortium bona gratia*

This category of divorce deals with more objective reasons and not necessarily with the spouses' personal failures. Physical impotence is grounds for divorce if it lasts for three years from the celebration of marriage. It must be antecedent to marriage, unknown to the woman and established as such in court.

The husband's untraceableness is grounds for divorce, but a word of clarification is in order. If the departure of the husband was justified, the abandoned party could remarry, provided that wrong information on the spouse's

death had reached her. If the man was a soldier, there was a need to wait five years. According to later ecclesiastical praxis, the period of absence was fixed at five years for civilians and ten years for soldiers. Imprisonment and slavery were also reasons for divorce, but only after five years. Byzantine Emperor Leo VI the Philosopher (+ 912) abolished this cause.

Madness is a marriage impediment but, if it arises after the wedding, does not constitute grounds for divorce. Emperor Leo had granted to the husband the right to divorce after three years from the madness of the wife, while the wife after five years from the madness of the husband; but this was not incorporated into the *Nomocanon*.

Monastic profession is grounds for the separation of spouses, as it is considered spiritual death. It goes without saying that the freedom of choice on the part of the spouse embracing monastic life is necessary and also the freely given consent of the other party. Lastly, there is the reception of the episcopal office, but the wife must freely renounce her right to another marriage and enter into a convent, far away from the episcopal see of her husband.

These grounds for divorce are generally admitted by the Orthodox canonical tradition, but each Church can admit other analogous causes. Following the 1453 Fall of Constantinople, the Orthodox of the Ottoman Empire continued to pursue the previous marriage legislation, in which ecclesiastical authorities exercised full jurisdiction in the matter. Due to the existing social conditions, recourse to divorce was rare. Patriarch Metrophanes Kritopoulos († 1639), in his *Confession of Faith* (1625), categorically asserts that marriage cannot be dissolved unless its cause is mentioned in the Gospel.²⁴ Nikodemus of Mount Athos († 1809), in his *Pidalion*, a commentary on Eastern Canon Law, holds for dissolution *ex delicto* for, in addition to adultery, the attempt on the spouse's life and for heresy. He also mentions some other grounds based on the prior existence of an impediment. One should keep in mind that the *Pidalion* was published under the auspices of the Ecumenical Patriarchate and remains a valuable work, especially in the Greek Church.²⁵

²⁴ Ioannis KARMIRIS, *Dogmatic and Symbolic Monuments of the Orthodox Church*, Athens 1953 and *A Synopsis of the Dogmatic Teaching of the Orthodox Church*, Boston 1973; Colin DAVEY, *Pioneer for Unity: Metrophanes Kritopoulos*, London 1988.

²⁵ Pierre L'HUILLIER, "L'indissolubilité du mariage dans le droit et la pratique orthodoxe," in *Studia Canonica* 21 (1987) 239-260 and *Canons of the Ecumenical Councils with Introduction by Peter L'Huillier*, in OrthodoxWiki.Org; Wilfried HARTMANN, *The History of Byzantine and Eastern Orthodox Canon Law*, Washington 2012; Paul MENEVISOGLOU, "The Canonical Collection Pidalion," in *Charisteion Serapheim*, Thessaloniki 1984, 147-166.

In the Byzantine nomo-canonical law and its derivative systems, except for the *divortium bona gratia* cases, dissolution of marriage is the result of an established crime. Accordingly, there is no official acknowledgment of a psychological error as defect of consent. Marriage is to be held valid when the required objective conditions are met. Free consent is one of the constitutive elements of marriage which is manifested by the participation of the spouses in the rites of engagement and crowning. The annulment concept is practically foreign to the Eastern tradition. Consequently, for the Orthodox Churches a marriage cannot end by means of a dissolution procedure.

Following a *bona gratia* divorce, marriage with a third person is allowed under the same conditions as for the innocent party after a divorce *cum damno*, with the exception of the case mentioned in can. 48 of the Council in Trullo (692), that is, the access to the episcopate of the husband and the promise of the wife to enter a convent.

3 – Divorce in the Russian Church

In Russia, the Byzantine marriage law was never completely implemented. There were even cases of divorce by mutual consent in the 16th and 17th centuries. During the so-called Synodic Era (1720-1917), the grounds for causes were reduced to seven: adultery, mutual fault in breaching a previous marriage, impotence, exile in Siberia, extended absence, apostasy, and joining the monastic life. However, the Holy Synod had the right to dissolve a marriage that was not included in these categories. The emperor also enjoyed the same privilege. The Council of Moscow (1917-1918) later extended this list.²⁶ This Council issued three decrees regarding divorce: the first, on 4 March 1918, about “the reasons for decrees on divorces and civil marriages;” the second, on 20 April 1918, about “the grounds for the divorce of marriages blessed by the Church;” and the third on 2 September 1918, about “further details of the previous decrees.”

The first decree elaborates on the reasons for issuing authoritative decisions by the Soviet national commissioners on divorce and civil marriage. Disregarding the directives of the Orthodox Church, divorce was admitted by the civil courts, based on the request of one or both spouses without any distinction. Accordingly, as for the simple marriage contract, registration of it at a nearby civil court was sufficient; as for the divorced, there was no

²⁶ Martin JUGIE, *Theologia dogmatica christianorum orientalium*, Paris 1930, III, 464-465; Joseph PRADER, *Il matrimonio nel mondo*, Padova 1986, 605-610.

limitation on further marriages. These norms, contrary to ecclesiastical law, could not be accepted by the Church authorities. Therefore the Holy Synod issued the following directives: 1) marriages blessed by the Church cannot be dissolved by civil authority, and civil divorces are not honored by the Church; 2) Orthodox faithful married by the Church and not divorced by her will be considered as living in polygamy and adultery when contracting civil marriage; 3) registration of spouses in a nearby civil registry does not replace the Church's blessing; for the Church to recognize these civil marriages, the Church's ritual crowning is necessary.²⁷

The decree of 20 April 1918 established that a marriage blessed by the Church was indissoluble. Further, a divorce "is recognized by the Church only through indulgence towards human frailty and with care for salvation," and on the condition that the marriage is irreparably broken. Divorce is then within the exclusive competence of the ecclesiastical court which acts upon the spouses' request and for the established grounds. According to said decree, the grounds are: apostasy, adultery, sins against nature, impotence (permanent and antecedent), leprosy and syphilis, prolonged absence (at least three continuous years), threat to the life of the spouse or children, sexual relationships between father-in-law and daughter-in-law, prostitution and remarriage.²⁸

The decree of 2 September 1918 added the incurable psychic disturbance of the spouse and the obstinate desertion of the spouse as acceptable grounds for divorce.²⁹ The social-cultural changes of the new millennium prompted the Church to enlarge the list with the following grounds: Acquired Immune Deficiency Syndrome, chronic alcoholism and drug addiction, and abortion without the husband's consent.³⁰ Today's Russian Church admits fourteen grounds for divorce, which is only to be sought as the extreme solution. The innocent partner is then allowed to remarry at once while the other must first fulfill the required ecclesiastical penance.

In its 28 December 1998 Resolution, the Holy Synod of the Russian Orthodox Church condemned the action/praxis of those priest-confessors who "forbid their spiritual children to contract new marriage, alleging the prohibition of the Church, and to apply for divorce on the grounds of unbearable conjugal life." To this end the Holy Synod reminds all parish priests of the words of Saint Paul: "If you are married, stay married. If you are not

²⁷ Jan DVORAČEK, *Il divorzio del vincolo matrimoniale nelle Chiese ortodosse e le sue conseguenze giuridiche per la Chiesa cattolica*, Roma 2009.

²⁸ *Ib.*, 85-86.

²⁹ *Ib.*, 86-87.

³⁰ <http://www.divorce-in-russian-church>.

married, do not try to get married. It is not wrong to marry, even if you have never been married before. But those who marry will have a lot of trouble, and I want to protect you from that.... A wife should stay married to her husband until he dies. Then she is free to marry again, but only to a man who is a follower of the Lord” (1 Cor 7:27-28, 39).³¹

4 – *Divorce in the Greek Church*

Following its declaration of independence from the Ottoman Empire, the Greek Nation recognized the sacramental nature of marriage and entrusted all matrimonial matters to the Church with the exception of divorce which remained within the competence of the State. Later on, the Church obtained an intermediary role in the matter of divorce, as the local bishop had to try to reconcile the parties; if he failed, one could have recourse to the civil court after three months. Once the civil divorce was granted, the bishop could allow the so-called “spiritual divorce.”³²

The grounds *cum damno* were adultery, attempt on the spouse’s life, abortion, and spiritual relationship. The grounds *bona gratia* were impotence, longtime absence, madness, apostasy, monastic vows, and a wife’s refusal to follow her husband. In 1920 a new law on divorce was promulgated and the grounds were divided in two groups: *absolute grounds* requiring a declaration of divorce (adultery, bigamy, attempted coniujcide, prolonged unaccounted absence); and *relative grounds* which could require divorce in case of impossible cohabitation (madness, impotence, untraceableness).

Up to 1982, civil marriage was not recognized by the Greek civil authority, but divorce was of its competence. Church authority had only the role of arbitrament. The 1940 Civil Code listed the following grounds for divorce: adultery, bigamy, attempted coniujcide, prolonged unaccounted absence, disruption of conjugal life, madness, leprosy, desertion and impotence. No-fault divorce was not permitted.

The libel of divorce was submitted to the local bishop who in turn tried to reconcile the spouses. If reconciliation was not reached within three months, the cause was deferred to the district civil court. When the divorce was granted, the procurator communicated the sentence to the competent bishop who, through his ecclesiastical court, issued his own decision.

³¹ Resolution n. 2228/1920.

³² Alexander BERGMANN, *Internationales Ehe- und Kindschaftrecht*, Frankfurt 1983; Joseph PRADER, *Op. cit.*, 258-263.

The divorced party who intended to remarry had to undergo penance, and the new wedding ritual had a penitential tone. The guilty party was not allowed to approach the parish priest, and the priest in turn was not permitted to participate in the new wedding banquet. The third marriage was only granted to childless forty-year-olds after refraining from holy Communion for five years. An exception was allowed to thirty-year-olds with children who were subject to a penance of four years.³³

The fifties dealt with so-called "dead marriages," that is, the marriages of those who for a long time were separated without reason in order to petition for divorce. The Chamber of Deputies proposed no fault divorce, provided that the separation had lasted at least seven years. The Greek Church strongly reacted against this kind of divorce. It was only in 1979 that a law on no fault divorce was issued requiring a ten year *de facto* separation of the spouses.³⁴ In 1982 a new law on the family abolished the obligatory civil marriage and introduced the alternative of entering marriage either civilly or religiously.

At the present time, matters of divorce devolve on the district civil court. The Church steps in after the civil sentence by dissolving the marriage on religious grounds. This is carried out for canonical marriages in order to allow the parties to get married again. Since 1982, the grounds for divorce are only two: the serious disturbance of conjugal life (through bigamy, adultery, abandonment, attempt on the spouse's life, or conjugal separation for a period of four consecutive years) and untraceableness; spouses can also request divorce by mutual agreement.³⁵

On her side, the Church lists the following grounds: *as for the husband* - the wife's adultery; attempt on his life by the wife; completed abortion making the wife unfit to continue conjugal life, or unjustified abandonment by the wife; *as for the wife* - the husband's adultery, a public and unjustified accusation of adultery by the husband, or an attempt at moral dishonor by the husband. For both: apostasy; refusal to baptize the children; the episcopal ordination of the husband, and the calling to the monastic life. To these

³³ Elias MELIA, "Le lien matrimonial à la lumière de la théologie sacramentaire et de la théologie morale de l'Église orthodoxe," in René METZ (ed.), *Le lien matrimonial*, Strasbourg 1970, 180-197.

³⁴ Dimitri SALACHAS, "Matrimonio e divorzio nel diritto canonico orientale. Spunti e riflessioni," in *Nicolaus* 1 (1973) 48-68, also "Mariage civil et mariage religieux en Grèce," in *Apollinaris* 58 (1985) 701-718; TREMBELAS, *Op. cit.*, Chapter 10: "Le sacrement du mariage," 339-367.

³⁵ PRADER, *Op. cit.*; RODOPOULOS, *Op. cit.*; Ioannis AKANTHOPOULOS, *Kodikas ieron kanonon kai ekklesiastikon nomon*, Thessaloniki 1995, 1132-1143.

should be added the untraceableness of one of the spouses (by death or abandonment).

5 – Divorce in the Oriental Orthodox Churches and the Assyro-Chaldean Church of the East

The Coptic Church permits divorce only on the grounds of the adultery or apostasy of one of the spouses. Impotence can also be considered a grounds for divorce. The dissolution of marriage is granted only by the ecclesiastical authority.³⁶

The Ethiopian/Eritrean Churches allow remarriage in church only if one of the spouses dies. A cleric can marry only once. If his wife dies, he is obliged to embrace the monastic life in order to continue in his priestly ministry. Separation is allowed on the grounds of adultery. In the case of divorce both parties – guilty or not – are considered ineligible to receive Holy Communion. Reconciliation takes place through the sacramental mystery of Penance and submission to the sacred canons.³⁷

The Armenian Church recognizes adultery as the only ground for the dissolution of marriage. In practice, divorce is also granted for other very serious reasons. The local bishop can grant a dispensation for a new marriage which then is celebrated in a less solemn or private form.³⁸

The Syrian-Orthodox Church seems to be the strictest community regarding marriage indissolubility, and so divorce on the ground of adultery is rarely given. Even the religious betrothal with the blessing of rings has a binding character.³⁹

³⁶ Oswald BURMESTER, *The Egyptian or Coptic Church*, Cairo 1967, 128-144; Kenneth STEVENSON, *Nuptial Blessing*, London 1982, 108-112; Alphonse RAES, *Le mariage dans les Eglises d'Orient*, Chevetogne 1959, 21-45.

³⁷ Paulos TZADUA, "Le diverse forme del matrimonio e il loro carattere dissolubile e indissolubile nella tradizione della Chiesa d'Etiopia," in *Quaderni di Studi Etiopici* 6-7 (1986) 5-30; PRADER, *Op. cit.*, 204-208; William BUHAGIAR, "Marriage under the Civil Code of Ethiopia," in *Journal of Ethiopia* 1 (1964) 73-99; STEVENSON, *Op. cit.*, 112-113; Kirsten PEDERSEN, *Gli Etiopi*, Vicenza 1993, 170.

³⁸ Claudio GUGEROTTI, "Seconde nozze e penitenza nelle Chiese Orientali, con particolare riferimento alla Chiesa Armena," in *Annali di Scienza Religiosa* 5 (2000) 81-92; STEVENSON, *Op. cit.*, 104-108; RAES, *Op. cit.*, 69-75.

³⁹ Alphonse RAES, *Il matrimonio, la sua celebrazione e spiritualità nelle Chiese d'Oriente*, Siena 2000, 109-140; STEVENSON, *Op. cit.*, 113-115; Wilhem DE VRIES, *Sakramenten-theologie bei den Syrichen*, Roma, 1940.

The Churches of the East (Assyrian, Malabar) consider divorce of its members as dishonorable, so it is very rare. Even if separation today seems more common, it is generally disapproved and unpopular. Only a religious divorce, very rarely granted as a last resort, may end the marriage contract.⁴⁰

6 – Procedure

Regarding the filing procedure for divorce, one should distinguish between the countries where the State is regulating them, as for example Greece, and the countries where the Orthodox Church itself takes care of them. In Greece, the Orthodox faithful planning to divorce ought to petition the local bishop who will first attempt to have the parties reconcile. If the attempt fails, the party asking the divorce turns to the civil court. Following the publication of the court decision, the civil procurator notifies the bishop who, in turn, shall proceed with the spiritual dissolution of the marriage. The bishop could reject the dissolution and, in this case, the divorce is only valid in the civil forum.⁴¹

In the countries where the Church can establish its own procedure, cases are handled by the ecclesiastical courts, for example, in the Greek Orthodox Archdiocese of America. Subsequent to the parish priest's failure at reconciliation, the spouses present a written request for divorce with its grounds, along with a copy of the civil divorce papers and the religious marriage certificate. The parish priest submits a written verification of the failed attempt at reconciliation as well as a biographical history of the parties in question and his recommendation to the Archdiocese. Archdiocesan procedure requires that the petitioner presents himself/herself before the spiritual court in order to verify the reasons alleged in the request. The sentence/decision is granted by the bishop and a copy of the decree is sent to the parish priest who, in turn, shall inform the parties and enter a notation in the sacramental register.⁴²

⁴⁰ Pierre YOUSIF, "The Sacrament of Marriage in the Tradition of the Church of the East," in Peter HOFRICHTER (ed.), *Syriac Dialogue. Fifth Consultation*, Vienna 2003, 40-56; Charles PAYNGOTT, "The Syro-Malabar Marriage," in Giustino FARNEDI (ed.), *La celebrazione Cristiana del matrimonio*, Roma 1986, 261-282.

⁴¹ Dimitrios SALACHAS, "Matrimonio e divorzio nel diritto canonico orientale," in *Nicolaus* 1 (1973) 63.

⁴² Patrick VISCUSO, "Divorce in the Greek Orthodox of North and South America," in *The Jurist* 50 (1990) 324-325.

7 – *Impediments*

Eastern Church lawyers follow a different nomenclature and categories than those in use among Catholics. One should not confuse the causes of divorce with the causes of invalidity and the impediments. It would appear that the Orthodox Church does not have universal procedures for appropriately dealing with requests of nullity. Orthodox law foresees the formal conditions essential for the liturgy of the sacrament. Moreover, there are certain substantial conditions of a positive character—the age, the legal ability and the free consent of the spouses—and of a negative type/class, that is, the impediments. Impediments are distinguished as prohibiting marriages altogether, or as making a marriage null and void only between some persons. There is also one particular prohibitive impediment, that is, the lack of observance of the mourning period by the widowed. The nonobservance of these substantial conditions renders marriage null. Furthermore, a marriage can be dissolved in two other cases: error concerning the identity of the partner and in the case of serious threats.⁴³

In general, the Orthodox maintain the following as ecclesiastical impediments: sacred orders, monastic vows, a fourth marriage, a spiritual relationship and a marriage with an unbaptized. If a mere ecclesiastical impediment is not compatible with civil law, the competent bishop could apply the principle of *oikonomia* for the common good of the Church.

As for the impediment of age, the Orthodox comply with the norms of the applicable civil law. Impotence, that is, the antecedent and incurable inability to the conjugal act, does not constitute an impediment. It rather gives the right to the other party to petition for dissolution of the marriage, following the required three-year period. The disciplines of the Oriental Orthodox Churches—Syrian, Ethiopian, Eritrean, and Armenian—and the Churches of the East do not require a three-year waiting period.

As for a fourth marriage, the Churches of the Byzantine tradition do not permit it. This impediment is also foreseen by the discipline of the Chaldean, Syrian, Coptic, Ethiopian and Eritrean Churches. As for sacred orders, marriage is forbidden to deacons, presbyters and bishops. A candidate for the priesthood can marry before his diaconal ordination. Once ordained, he cannot marry any longer, not even if he becomes a widower. Among the Syrians, the Armenians, the Copts, the Ethiopians and the Eritreans, deacons can marry even after ordination. The Church of the East allows its presbyters to marry after ordination.

⁴³ Astrid KAPTJUN, “Matrimonio e divorzio nel diritto delle Chiese ortodosse,” in *Daimon* 2 (2002) 101-114.

The monastic state is also an absolute and diriment impediment in Churches of the Byzantine tradition and in the Coptic-Orthodox Church. It is, on the other hand, only a prohibitory impediment in the Syrian, Ethiopian and Eritrean Churches. Consanguinity, in Churches of the Byzantine tradition, is considered a diriment impediment up to the fourth degree in the collateral line. In the Coptic Orthodox Church, the same impediment is extended up to the third degree and, in the Ethiopian and Eritrean Orthodox Churches, up to the seventh degree. Among the Syrians, Assyrians and Armenians, it is up to the fourth degree in the collateral line.

Affinity, again in Churches of the Byzantine tradition, is held as an impediment up to the fourth degree in the collateral line, and the same is true in the Coptic Orthodox Church. The Syrians rate it up to the second degree and the Armenians to the fourth. Spiritual relationship between the godparent and the godchild or between the godparent and the parent is regarded as a diriment impediment by Churches of the Byzantine tradition. However, for a just cause, a dispensation by the bishop is possible. This is also the case among the Syrians, the Armenians, the Ethiopians and Eritreans, but not for the Copts and the Assyro-Chaldeans.

Conclusion

The 1990 *Codex Canonum Ecclesiarum Orientalium* for the Eastern Catholic Churches, in c. 781, 1°, asserts that if sometimes the Church must pronounce a judgment about the validity of a marriage between baptized non-Catholics, there shall be observed the law to which the parties were subject at the time of their wedding. This is also true for the Latin Church in virtue of § 4 of the 2005 Instruction *Dignitas connubii*. The two norms are very important because “more and more frequently divorced Orthodox Christians ask Catholic ecclesiastical courts for a declaration of nullity/invalidity of marriage in order to be able to celebrate a new marriage with a Catholic party. If the reason of nullity/invalidity is a defect of consent founded on natural law or on an impediment of divine law, the norms of canon law must be followed. If, instead, it is matter of a marriage which is null due to a defect of consent founded on a merely ecclesiastical law (as for instance, grave fear, fraudulent error, conditioned consent) or due to a diriment impediment of human law or due to a defect of form, the judges should take into account the respective Orthodox discipline.”⁴⁴

⁴⁴ Joseph PRADER, *Il Matrimonio in Oriente e Occidente*, Roma 2003, 53

In the abstract, the Catholic Church could recognize the *modus procedendi* for the dissolution of marriage of the Orthodox Churches, always safeguarding divine law. The Catholic Church could also recognize the declaration of invalidity of marriage granted by the Orthodox hierarchs, in accordance with their own norms and impediments, even if such impediments are not included in Catholic canonical norms. The Catholic Church, however, does not recognize (and does not intend to recognize) divorce on the grounds of adultery, as happens in some Orthodox Churches. Neither does she abide by the application of the principle of *oikonomia* (which thwarts divine law) because such dissolutions suppose the participation of ecclesiastical authority in dissolving a valid marriage pact. This is the reason why a divorced Orthodox cannot validly marry a Catholic on the basis of the Orthodox decree alone. In this case, the Orthodox party must ask the competent Catholic court for a declaration of nullity/invalidity of his/her previous marriage.⁴⁵

The Orthodox sentences/decisions *de facto* do not offer any distinction between “declaration of invalidity” and “nullity” or “divorce,” and there is no explanation for the granted decisions. Consequently, in doubt, the validity of a marriage is to be upheld until the contrary is proven.⁴⁶ In the ordinary practice, many Orthodox Churches seem to ratify the civil sentence of divorce, that is, the divorce of a religious marriage. However, in the Orthodox Churches of the Middle East, the ecclesiastical authorities, which enjoy exclusive competence in marriage matters, grant sentences of dissolution of religious marriages through the *oikonomia* system.

Should the competent authority of the Catholic Church examine a civil marriage of two Orthodox unable to approach a priest, if it is proven that the marriage between two Orthodox or one Orthodox and one baptized non-Catholic could have been celebrated without serious inconvenience before an Orthodox priest, the marriage is null and void by defect of sacred rite.⁴⁷ Would it not be possible, among the various hypotheses of *dissolution* of the marriage bond foreseen in Catholic canon law (favor of the faith and non-consummation cases), to admit other forms of failed marriages?

⁴⁵ *Declaratio*, 20 octobris 2006, in *Communicationes* 39 (2007) 66-67; Declarations of Marriage Nullity by the Orthodox Church in Romania, in William DANIEL (ed.), *Ministerium Iustitiae: Jurisprudence of the Supreme Tribunal of the Apostolic Signature*, Montréal 2011, 759-761.

⁴⁶ CIC can. 1060 and CCEO can. 779.

⁴⁷ Decrees of the Apostolic Signature, in Xaverius OCHOA (ed.), *Leges Ecclesiae*, Roma 1974, vol. 4, n. 3390, and in Zenon GROCHOLEWSKI (ed.), *Documenta recentiora circa rem matrimonalem et processualem*, Roma 1980, vol. 2, 111-112.

RÉVISION DES CONSTITUTIONS : MÉTHODOLOGIE ET TRAVAUX PRATIQUES

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RÉSUMÉ — L'étude présente veut mettre en relief la problématique concernant le projet de la révision des constitutions auprès des instituts de vie consacrée. Les changements socioculturels de notre siècle exigent, en fait, l'adaptation des textes constitutionnels pour que les membres consacrés puissent mieux répondre à la vocation reçue selon le charisme institué. Bien que la méthodologie linéaire des travaux soit le choix personnel de chaque institut, il semble nécessaire voire même obligatoire, malgré tout, de prédéterminer une épistémologie concrète — répondant de la façon la plus adéquate possible aux exigences réelles — permettant ainsi de procéder efficacement à l'effort de révision. Enfin, étant donné les difficultés qui émergent de la gestion ordinaire du gouvernement ecclésial, l'auteur propose de nouvelles normes entendues comme des éléments à prendre en considération pour une possible législation dans l'avenir.

SUMMARY — The present study aims to highlight issues concerning the project of the revision of the constitutions of institutes of consecrated life. The socio-cultural changes of our century require, in fact, the adaptation of constitutional texts so that consecrated members can respond better to the vocation received according to the established charisma. Although the linear methodology of work is the personal choice of each institute, it seems necessary or even compulsory, despite everything, to predetermine a concrete epistemology — responding in the most appropriate way possible to real needs — thereby allowing the institute to proceed effectively in its revising effort. Finally, given the difficulties that arise from the ordinary affairs of ecclesiastical governance, the author proposes new norms understood as elements to be considered for possible future legislation.

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Introduction

L'année 2015 dédiée à la vie consacrée — voulue expressément par le Pape François — donne l'occasion, à toutes les personnes consacrées, d'approfondir soit leurs propres racines charismatiques soit leur réponse individuelle à la vocation formée par le charisme même. Dans ce contexte, il serait opportun de renouveler, de façon authentique, la vie, sa qualité, la mission et l'apostolat des instituts en prenant en considération les conditions actuelles dans lesquelles se situe chaque type de la consécration formalisée. Cependant, un nombre considérable d'instituts montre des signes de fragilité dus, entre autres, au vieillissement des membres et à la diminution des vocations. La perte du courage pour affronter les signes du temps présent comme, par exemple, le témoignage fondamental promis au moment de la profession religieuse, constitue l'un des plus importants éléments de la crise que nous ne pouvons pas omettre.

L'Église demande constamment aux consacrés de retrouver les motivations les plus authentiques possibles afin de découvrir les formes appropriées pour répondre aux exigences spirituelles de notre époque sans s'éloigner de l'inspiration initiale¹. Cette même exhortation apostolique *Vita consecrata* nous suggère aussi que les indices les plus solides pour la réalisation créative et fidèle de ce but se trouvent dans les constitutions de chaque institut. Pour mieux illustrer les réflexions mentionnées, nous allons faire appel à la problématique concernant la révision des textes constitutionnels des instituts, en nous concentrant sur l'utilisation de la méthodologie prédéterminée et sur le déroulement correct des travaux pratiques de rédaction.

1 — *L'opportunité d'actualisation des constitutions*

Les instituts de vie consacrée bénéficient aujourd'hui du grand don de la pensée doctrinale du Concile Vatican II. Grâce à son enseignement magistériel, leurs propres textes constitutionnels ont reçu une profondeur biblique et théologique, une clarté juridique et la conscience de leur identité charismatique.

La valeur charismatique, ecclésiale et historique des constitutions, surtout des constitutions des instituts traditionnels du monde occidental, est indiscutable. Pourtant quelques normes et quelques dispositions auraient pu être opportunément renouvelées. Les changements en vigueur depuis la promulgation de

¹ Cf. JEAN-PAUL II, exhortation apostolique post-synodale *Vita consecrata*, 2 février 1996, n° 37, dans AAS, 88 (1996), 377-487.

la nouvelle législation de l'Église latine en 1983 rendent la susdite nécessité encore plus plausible. Parallèlement, nous observons le développement de la doctrine sur la vie consacrée, nous découvrons les études relatives à l'héritage des fondateurs, nous assistons à la relecture des textes sous l'angle de notre actualité inexistante à l'époque de l'élaboration des propres textes juridiques fondamentaux².

À l'opposé, l'expérience commune des instituts s'avère plutôt négative. Nous assistons à la réduction, en nombre, des membres, due aux changements profonds dans la mentalité postmoderne ; nous assistons également à la croissance en nombre des candidats, représentants d'une autre culture que l'occidentale dont les intentions à mener la vie religieuse ne sont pas toujours sincères et honnêtes ; enfin nous assistons à la réorganisation des œuvres et de leurs propres travaux. Nous constatons la surcharge d'obligations par rapport aux possibilités réelles des instituts, la reformulation des structures internes, des activités excessives, l'affaiblissement de la vie communautaire et spirituelle et enfin des problèmes économiques fréquents.

Chaque institut, tout en gardant son propre charisme, est appelé aujourd'hui à se mesurer avec les susdites circonstances, à surmonter les problèmes dérivant de la différence sociale, de la différence de générations et même de la différence ethnique des membres. Selon le cardinal Franc Rodé, ancien Préfet de la Congrégation des Instituts de vie consacrée et les Sociétés de vie apostolique, la majorité des instituts ont été obligés de célébrer leurs chapitres afin de revitaliser ou requalifier la totalité de leur mode de vie pour répondre aux défis actuels³. Cependant, le résultat des travaux menés n'est pas toujours satisfaisant⁴.

Ayant bien présenté la consistance de ces problématiques, vu le parcours de diverses tentatives pour rendre les textes constitutionnels fondamentaux

² En vérité, le canon 587, §1 contemple les éléments indispensables de chaque texte constitutionnel : le patrimoine, la nature et les finalités propres, la discipline des membres, leur incorporation et la formation, l'objet des liens sacrés. Les autres — également importants — sont exprimés par les normes suivantes : canons 581 ; 587 ; 587, §1 ; 587, §3 ; 596, §1 ; 598, §1 ; 599 ; 600 ; 601 ; 609, §1 ; 613, §1 ; 614 ; 615 ; 616, §1, 2 ; 616, §3 ; 616, §4 ; 623 ; 624, §1 ; 625, §1 ; 625, §3 ; 627, §1 ; 631, §2 ; 634, §1 ; 647, §2 ; 662, 667, §3 ; 668, §1 ; 670. Cf. le commentaire détaillé effectué par A. JIMÉNEZ ECHAVE, « Actualización y renovación de las constituciones y directorios », dans *Apollinaris*, 84 (2011), 278-280 ; A. MONTAN, « Costituzioni. Attenzioni giuridiche », dans *Sequela Christi*, 32/2 (2006), 180-183.

³ Cf. F. RODÉ, « Les constitutions dans la vie religieuse aujourd'hui », dans *Bogoslovni vestnik*, 70 (2010), 296.

⁴ Cf. M. E. POSADA, « Costituzioni. Attenzioni carismatiche », dans *Sequela Christi*, 32/2 (2006), 198-199.

plus efficaces pour la vitalité de l'institut, il nous semble obligatoire d'affirmer que les constitutions ne sont pas une loi écrite de façon fixe et presque immuable. Elles tendent plutôt à être un code propre, un ensemble de normes vivantes, un livre vital, une disposition élaborée selon les nouvelles possibilités d'adaptation et selon le progrès imminent.

Il est évident que la révision des textes constitutionnels ne résoudra pas toutes les questions angoissantes du futur imminent des instituts mais permettra au moins de focaliser les problèmes les plus importants qui nécessitent des solutions immédiates. Cette optique nous permet de constater qu'il est hors de question pour les instituts d'avoir l'intention de réélaborer des textes normatifs (une récolte de sources et de matériels nouveaux, une nouvelle organisation de la structure, une terminologie intonative). Il s'agira plutôt de faire l'effort de relire le texte même du point de vue théologique, historique, magistériel tout en soulignant le vécu institutionnel de chaque institut, c'est-à-dire l'expérience personnelle et institutionnelle de toutes ces juridictions (autant titulaires des offices capitaux que membres incorporés définitivement) et de tout ce qui comporte les défis ecclésiaux, culturels, sociaux. Il en résulte la nécessité de modifier seulement ces parties du texte qui ne correspondent plus aux exigences actuelles sans transformer les éléments charismatiques car une telle modification égalerait à une déformation du charisme de fondation ce qui aboutirait à une possible nouvelle définition de l'institut, ce qui demanderait une approbation ultérieure de l'autorité compétente dans le sens du canon 589⁵.

Les constitutions, tout en restant fidèles au patrimoine de l'institut et à son caractère, sa nature peuvent être opportunément revue selon les exigences de l'Église universelle, particulière et de la société. Les textes constitutionnels ne peuvent pas manquer non plus de clarté et d'univocité quant à la formulation des normes fondées sur la compréhension correcte du charisme de fondation⁶. Le contraire pourrait provoquer une incertitude juridique inacceptable, particulièrement en face des nombreux conditionnements extérieurs et des exigences apostoliques⁷.

⁵ Cf. A. JIMÉNEZ ECHAVE, « Actualización y renovación de las Constituciones », 272 ; Y. SUGAWARA, « Concetto teologico e giuridico del 'Charisma foundationis' degli Istituti di vita consacrata », dans *Periodica*, 91 (2002), 258.

⁶ Cf. can. 587, §1.

⁷ Cf. Y. SUGAWARA, « Il ruolo delle Costituzioni negli Istituti di vita consacrata (can. 587) », dans *Periodica*, 98 (2009), 691.

2 — *Les expériences des révisions antérieures au Code en vigueur*

Nous devons tout d'abord accentuer le fait que les travaux et l'effort de rédaction du texte des constitutions actualisées ont été entrepris par tous les instituts, surtout après la promulgation du nouveau Code, entendu — dans le sens des réflexions présentes — comme une transposition de la pensée conciliaire au niveau du langage juridique⁸.

En vérité, la publication en 1901 des *Normes* relatives à la rédaction des textes fondamentaux pour les instituts de voix simples⁹ entraîna le processus de transformation des constitutions. Le Saint-Siège exigeait, en fait, le maximum de discipline et de précision technique dans la formulation des normes. Les instituts ont été obligés d'élaborer leurs documents avec la plus grande exactitude possible. Les dispositions de la Congrégation des Evêques et des Réguliers, réaffirmées en 1921, ont précisé que les textes légaux devaient rester en tant que tels, c'est-à-dire privés de transcriptions des textes bibliques, des conciles ou des saints, des instructions ascétiques, des exhortations spirituels, des considérations mystiques¹⁰. Cependant nous observons qu'au fur et à mesure de la maturation de la théologie et de la conscience relative au signifiant du droit propre, on a permis aux instituts d'introduire de brèves enseignements concernant la vie spirituelle et religieuse.

Indépendamment du contenu des textes constitutionnels — plus légal que spirituel — les premières tentatives de formalisation du droit constitutionnel ont été marquées par l'incertitude et de graves difficultés. À cette époque, nous devons le définir, comme inexistant, le texte modèle des constitutions qui aurait permis de déterminer soit les éléments essentiels soit le style : un code propre, entendu comme un ensemble de normes minutieuses ou plutôt un livre dont la fonction serait de traduire et d'ordonner la vie selon l'idéal évangélique.

C'est le Concile Vatican II qui fut un vrai tournant marquant profondément les adaptations et les réélaborations des constitutions aux exigences actuelles.

⁸ L'histoire de la réception de la pensée conciliaire en objet présente M. DORTÉL-CLAUDOT, « The Task of Revising the Constitutions of the Institutes of Consecrated Life as Called for by Vatican II », dans R. LATOURELLE (dir.), *Vatican II. Assessment and Perspectives. Twenty-five Years after (1962-1987)*, New York, Paulist Press, 1989, 90-130.

⁹ Cf. *Normae secundum quas Sacra Congregatio Episcoporum et Regularium procedere solet in approbandis novis Institutis votorum simplicium*, 28 juin 1901, dans T. SCHÄFER, *De religiosis ad normam Codicis Iuris Canonici*, Rome, 1947, 1102-1135.

¹⁰ Cf. SACRÉE CONGRÉGATION DES ÉVÊQUES ET DES RELIGIEUX, *Normae secundum quas*, 6 mars 1921, art. 22i et 22k, dans AAS, 13 (1921), 315.

À ce propos, la doctrine conciliaire sur la vie religieuse a mis en évidence non seulement la nature théologique du charisme mais elle a accentué aussi l'importance de la révision des structures indispensables des instituts pour que, après avoir supprimé ce qui était désuet et ce qui ne correspondait pas à la situation réelle, une *ius novissimum* prenne sa source dans une solide base biblico-théologique et dans l'approfondissement du charisme de fondation¹¹. Nous tenons actuellement pour acquis que l'affirmation *Concilium dixit* est devenue un point de repère quant aux principes selon lesquels chaque institut doit réordonner le droit propre, tout particulièrement, les constitutions¹².

La valorisation des instituts par le magistère du Concile a suscité un mouvement d'une grande ferveur avec un enthousiasme évident pour le travail. En fait, les années 1970 et surtout 1980 voient de nombreux instituts s'impliquer dans l'élaboration du droit fondamental dont les traits caractéristiques proviennent des sources historiques, narratives et documentaires des fondateurs, tout en tenant compte des indications ultérieures du Saint-Siège¹³. Nous devons souligner le rôle significatif des chapitres spéciaux dont la tâche a consisté à légiférer convenablement le processus d'adaptation du droit propre aux exigences du monde moderne, en mesurant ensuite les avantages et les inconvénients des constitutions actualisées — introduites *ad experimentum* — avant d'avoir pris une option définitive¹⁴. Cependant, la majorité des textes, quoique rédigés et prêts, n'étaient pas soumis à l'approbation parce qu'on attendait la promulgation imminente du nouveau Code de droit canonique aux normes duquel les constitutions devraient être nécessairement subordonnées¹⁵.

Or, bien que les Constitutions, reflétant le régime du Code de 1917, soient à leur disposition, les instituts reconnaissent une difficulté ultérieure relative à l'élaboration d'un texte normatif constitutif, direct, intégral et stable¹⁶ dont

¹¹ Cf. RODÉ, « Les constitutions dans la vie religieuse », 296.

¹² En particulier il faut mettre en relief les documents : CONCILE OECUMENIQUE VATICAN II, décret *Perfectae caritatis*, 28 octobre 1965, n° 3c, dans AAS, 57 (1965), 703 ; décret *Christus Dominus*, 28 octobre 1965, n. 35, dans AAS, 57 (1965), 682 ; PAUL VI, lettre apostolique *Ecclesiae sanctae*, 6 août 1966, n. II, 12-14, dans AAS, 58 (1966), 761.

¹³ Cf. PAUL VI, exhortation apostolique *Evangelica testificatio*, 29 juin 1971, dans AAS, 63 (1971), 497-527.

¹⁴ Cf. M. DORTÉL-CLAUDOT, « Règle de vie, Constitutions, et Codes complémentaires », dans *Sequela Christi*, 32/2 (2006), 162.

¹⁵ Cf. CONGRÉGATION POUR LES RELIGIEUX ET LES INSTITUTS SÉCULIERS, document *Essential Elements in the Church's Teaching as Applied to Institutes Dedicated to Works of Apostolate*, Rome, 31 mai 1983, n°s 4-8 ; décret *Iuris canonici Codice*, 2 février 1983, dans AAS, 76 (1984), 498-499.

¹⁶ Cf. D. ANDRÉS, *La forme di vita consacrata. Commentario teologico-giuridico al Codice di diritto canonico*, Rome, Edicluc, 2008, 56.

l'application — vu la nature et la mission spécifique d'un institut propre — serait possible pour la totalité des membres. En outre, le risque majeur dériverait de la préoccupation que la rénovation ne serait que superficielle, transitoire ou absolument provisoire¹⁷.

L'art de la rénovation consisterait, donc, en la capacité de composer un vrai code universel et permanent dont les éléments juridiques — justifiés par la motivation spirituelle¹⁸ — seraient harmonieusement associés aux éléments théologiques. Le même code devrait aussi déterminer les dispositions légales concernant la structure basilicale, le gouvernement, la discipline, les activités d'un institut. Dans un tel sens, les constitutions peuvent exprimer sa valeur dans la mesure où elles sont capables de permettre aux religieux un exercice libre et spontané de leur propre vocation en conformité avec la communion ecclésiale et avec les ordres des supérieurs légitimes.

3 — Les difficultés possibles au cours de la révision

Attendu que l'actualisation des textes normatifs des instituts implique la recherche et la fidélité à « l'esprit des fondateurs et à leurs intentions spécifiques » ainsi qu'aux 'saines traditions' »¹⁹, il est certainement probable que les travaux de révision vont rencontrer des obstacles causés par les limites humaines — c'est-à-dire de ne pas être suffisamment capable d'élaborer un projet de droit nouveau qui serait partagé par la majorité des intéressés. Il faut admettre que les dispositions légales des instituts reflètent souvent le choix de l'orientation politique entreprise par le gouvernement général. Elles peuvent exprimer aussi le résultat d'un compromis dans la mesure où les pouvoirs et les prérogatives seront concrètement partagés pour prendre les décisions de la plus haute importance pour la totalité de l'institut²⁰. Ces décisions devraient être prises — *quantum fieri potest* — en prenant en considération non seulement les besoins de l'institut mais aussi les nécessités particulières de chaque circonscription du même institut sans pourtant compromettre ses intérêts juridiques. Dans une telle situation, il est évident que

¹⁷ Cf. E. PIRONIO, « Constitutiones renovadas », dans *Informationes S.C.R.I.S.*, 9 (1983), 5.

¹⁸ Cf. can. 587, §3 ; V. MACCA, « Le costituzioni, tra teologia e diritto », dans *Informationes S.C.R.I.S.*, 9 (1983), 120.

¹⁹ *Perfectae caritatis*, n. 2b.

²⁰ Il s'agit des compétences dont l'indication est indispensable en ce qui concerne la réalisation des actes comme : l'érection des circonscriptions et particulièrement leur suppression (tout en tenant compte des critères qui permettent de l'effectuer), l'union et la division des maisons religieuses, l'administration des biens temporels, etc.

le texte des constitutions — accepté par le chapitre général et approuvé ultérieurement par l'autorité compétente externe — doit être élaboré de façon à ne pas permettre la formulation des normes dont l'actuation sanctionnerait l'arbitraire décisionnel en provoquant des conséquences désastreuses.

Entendues, comme code fondamental de la vie et de la mission d'un institut, les constitutions doivent être un livre de repère dont il est possible de déduire avec clarté soit son charisme (son interprétation incluse) soit sa nature. Il est évident que les travaux sur la révision du droit en tant que tel ne peuvent pas être confiés à tous les membres. À l'opposé, cette activité ne devrait pas être effectuée par un groupe des membres impréparés ou élus selon des critères tout autres que techniques, ce qui pourrait imposer d'une façon presque apodictique (manipulation) la vision de la totalité des éléments essentiels sans lesquels la vie formalisée devient impraticable et impossible²¹. D'autre part, on pourrait présenter le charisme fragmentaire. Cette approche pourrait ultérieurement causer une incertitude des normes, à observer que, par leur nature, elles ne peuvent pas être ambiguës²². Il faudrait souligner que, nonobstant des expériences négatives du passé — concernant le manque d'harmonisation des éléments juridiques et spirituels — on observe aujourd'hui la même fatigue auprès des instituts quant à la recherche d'un juste équilibre entre la disposition légale et l'exhortation²³.

Pour éviter des conflits inutiles, il est souhaitable que le projet soit élaboré par des spécialistes en prenant en considération surtout leur préparation scientifique mais aussi la provenance géographique dans laquelle le charisme vit et répond diversement aux besoins des lieux et du temps. Il est probable qu'en mettant en œuvre cette modalité, on puisse éviter la perte de l'enthousiasme et du sens de l'union familiale et l'approfondissement coresponsable de la même identité charismatique²⁴.

4 — *La méthodologie linéaire*

Les réflexions qui vont suivre ont pour objet une recherche ou une proposition concernant l'élaboration d'une méthode à laquelle on pourrait recourir dans le processus révisionnel des textes constitutionnels. Bien

²¹ Cf. JIMÉNEZ ECHAVE, « Actualización y renovación de las Constituciones », 284.

²² Cf. MONTAN, « Costituzioni. Attenzioni giuridiche », 187.

²³ Cf. E. GAMBARI, *La vita religiosa secondo il Concilio e il nuovo diritto canonico*, Rome, Ed. Monfortane, 1985, 67-81 ; M. DORTEL-CLAUDOT, « The Task of Revising the Constitutions », 107-108.

²⁴ Cf. PIRONIO, « Constitutiones renovadas », 4.

qu'il soit souvent impossible d'en indiquer une — valide et convaincante pour tous les intéressés — il serait plausible, au sein de la présente exposition doctrinale, qu'on puisse procéder à partir d'une expérience historique, ecclésiale pour la sélection des techniques d'application concrètes pour le futur imminent.

4.1 — Limitations relatives aux considérations générales

D'une manière analogue à l'allocution du Pape Benoît XVI à la Curie romaine, nous pouvons constater que tous les instituts, dans le processus de la révision des constitutions, doivent considérer le fait selon lequel l'actualisation du droit constitutionnel se déroule en tenant compte constamment du sujet unique, c'est-à-dire, l'institut. Cependant, cet institut même — agrandi et développé à travers les siècles — reste essentiellement immuable à condition qu'il obéisse toujours à l'Église entendue comme *Institution semper reformanda*. Le Pape appelle ce phénomène l'« herméneutique de la réforme »²⁵ à l'opposé de l'« herméneutique de la rupture et de la discontinuité » susceptible de subir des changements fondamentaux à propos de l'essence du sujet, à savoir, le charisme de fondation.

Dans un tel contexte, il est indispensable de souligner que l'*aggiornamento* du Concile Vatican II devrait respecter la tradition des instituts sans se concentrer exagérément sur la requalification des éléments nécessaires. L'herméneutique de la réforme doit prendre en considération l'héritage spirituel-charismatique de chaque institut et le rendre aujourd'hui harmoniquement intégré sans atténuation ni déformation. C'est pourquoi, nous affirmons que, pour y aboutir, les constitutions actualisées devraient focaliser leur effort non seulement sur la mémoire du charisme du fondateur mais surtout sur la revitalisation de celui de l'institut, tout particulièrement, dans le cas des instituts centenaires. Le susdit charisme et toutes les traditions doivent rester immuables mais en même temps devraient être opportunément transcrits — par l'intermédiaire des dispositions légales, certes et univoques — selon les besoins actuels de l'institut. Il serait donc opportun que le projet des constitutions révisées élimine des normes désuètes : ou en modifiant les dispositions — selon les critères directifs des travaux — ou en introduisant des lois nouvelles dont l'existence n'était pas indispensablement nécessaire pour l'institut il y a encore quelques années.

²⁵ Cf. BENOÎT XVI, *Discours à la Curie romaine à l'occasion de la présentation des vœux de Noël*, 22 décembre 2005, dans AAS, 98 (2006), 40-53.

Des observations similaires touchent également le langage à utiliser : les formulations trop génériques et parfois juridiques²⁶ pourraient être remplacées par une nomenclature capable d'exprimer la spécificité propre du charisme de l'institut, sa nature, ses structures, sa tradition, ses usages, etc. On ne peut pas oublier non plus que l'élaboration détaillée et claire du projet révisé doit dépendre des conditions qui régissent l'institut, notamment : l'époque de sa fondation, la quantité des membres définitivement incorporés, l'existence ou non-existence d'études sérieuses traitant de la nature, du charisme, de l'identité, des traditions de l'institut, des problématiques et des difficultés plus complexes, des pronostics désastreux quant à l'avenir immédiat, etc.

4.2 — Limitations relatives aux considérations pratiques

Chaque institut, après avoir reçu le mandat du chapitre général²⁷, devrait élaborer une méthodologie reflétant surtout la qualité de la révision. Le mandat doit prendre en considération la nécessité des travaux préliminaires (les études relatives aux défis actuels ainsi que la nouvelle polarisation des présences des instituts ; les exigences particulières ; les opinions des experts en droit canonique, en théologie nouvelle et celle de la vie consacrée) et tenir compte de possibles difficultés. En d'autres termes : des directives plus détaillées à propos du travail de révision doivent être proposées par chaque Institut. En outre, il serait souhaitable que les travaux se déroulent, dans la relative brièveté temporelle, de façon à ne pas compromettre les éléments *sine qua non* du texte normatif. Toute hâte ou toute lenteur dans le processus de révision du droit constitutionnel sera considérée comme non sérieuse.

Il est essentiel, plus que jamais, d'intensifier les efforts pour établir une méthodologie adéquate dont la partie centrale serait consacrée aussi bien à l'élaboration d'un *modus procedendi* qu'à la création d'une équipe d'experts — membres du même institut — responsables des changements à appliquer. Vu que le texte constitutionnel de chaque institut est une norme contraignante, il serait opportun de confier les travaux aux experts en droit canonique, en théologie, en histoire et en spiritualité pour que le texte modifié ne soit pas seulement une proposition exhortative ou, par contre, une disposition

²⁶ En considérant que la plupart des constitutions ont été élaborées avant la promulgation du nouveau Code de droit universel, leur structure, la forme et le style reflètent les dispositions codicilles abrogées.

²⁷ Il s'agit de l'actualisation du texte normatif, ce qui signifie que l'on doit se concentrer sur l'élimination d'éléments désuets ou l'élaboration d'éléments manquants.

trop juridique²⁸. La recherche d'un juste équilibre entre les deux réalités et sa mise en œuvre devraient valoriser l'habileté des experts dans l'harmonisation des éléments constitutifs de chaque loi, spécialement celle appelée à ordonner les choses spirituelles²⁹. Cette même équipe, créée au niveau général de tout institut, devrait trouver dans l'autorité suprême un appui moral et matériel. En plus, l'équipe devrait avoir la possibilité de travailler sous sa direction en vue de profiter de ses suggestions et de son expérience acquise durant le gouvernement autoritaire de la totalité de l'institut. Nous admettons aussi que les travaux pourraient être effectués par une commission internationale (hypothèse d'instituts épars) qui pourrait contribuer au projet révisionnel en démontrant sa propre sensibilité dans le vécu du même institut dans le monde entier. Par ailleurs, il est possible que les travaux puissent procéder à des juridictions. Cependant, le choix et la réalisation de cette ultime proposition doivent impliquer, quand même, l'existence d'une commission générale, responsable des vérifications et de la première approbation du texte ; mais dans ce cas-là, les efforts seraient doublés. Il faut considérer, quoi qu'il en soit, que la multiplication des structures exécutives rendrait le travail des révisions trop lourd et peu clair en prenant en considération aussi bien le but et les exigences auxquels tendent les efforts de l'institut.

Selon l'opinion de celui qui écrit, il est hors de question d'instaurer l'hypothèse selon laquelle le projet des constitutions révisées serait proposé par tous les membres de l'institut auxquels indiscutablement appartient le droit de consultation des ébauches (pendant et après les travaux). Pourtant, à cause du manque de qualifications scientifiques et d'instruments intellectuels nécessaires, la participation pleine et dynamique au projet ne pourrait pas être garantie.

On ne peut pas exclure que le même groupe auquel l'institut confie la révision puisse avoir besoin de consultations critiques. À ce niveau des travaux, l'opinion des experts, ou de ceux qui ont acquis une excellente connaissance de la réalité par une longue pratique ou grâce à une grande habileté obtenue dans le processus d'établissement de textes analogues, soit tout à fait désirable. L'analyse progressive des textes élaborés devrait intéresser aussi les membres qui, grâce à leur spécialisation professionnelle ainsi qu'à leur expérience personnelle acquise au cours de la gestion, seraient un excellent appui par rapport aux suggestions critiques. Nous soulignons, également, que le contenu des projets devrait être nécessairement vérifié par des juristes ou,

²⁸ Quant à la structuration matérielle des normes, il serait possible que l'institut fasse des constitutions entendues comme un code propre avec un minimum normatif requiert et des statuts généraux détaillés contenant les dispositions pratiques.

²⁹ Cf. *Ecclesiae sanctae*, II, n. 13 ; MONTAN, « Costituzioni. Attenzioni giuridiche », 178.

tout au moins, par des experts en droit de l'Église. En effet, vu qu'ils sont conscients, pour la plupart d'entre eux, de la nature légale du texte proposé, cette dernière devrait accompagner le processus d'actualisation des constitutions. Également, il ne faut pas oublier que les ébauches seront soumises ultérieurement au jugement décisif de l'autorité ecclésiale compétente qui a le droit d'introduire des changements nécessaires et substantiels.

En outre, la méthodologie devrait prendre en considération le droit subjectif dont jouit chaque membre de l'institut. Chacun pourra prendre personnellement connaissance des textes vraisemblablement contraignants. Sans l'ombre d'un doute, il est interdit de rayer la participation active de tous les membres dans un tel événement. Cependant, l'expérience des instituts en question démontre que les effets peuvent être déroutants.

Il faut considérer comme peu efficace la distribution du texte constitutionnel actualisé divisé en chapitres car la structure du projet pourrait diverger de celui en vigueur tout en empêchant la compréhension totale de l'ensemble des normes constitutives pour la vie et l'apostolat d'un institut. Les suggestions relatives à l'œuvre complète — quoique de forme provisoire — seront primordiales et capitales pour l'équipe responsable qui doit tenir compte des circonstances du vécu personnel et institutionnel de l'institut³⁰.

Celui qui écrit est loin de vouloir imposer les solutions proposées. Son intention est d'ébaucher les idées principales dont l'observance pourrait garantir un achèvement efficace du projet des constitutions actualisées. En raison de la diversité historique et culturelle, du patrimoine ecclésial à préserver, des problèmes urgents qui surplombent la vie consacrée, nous pouvons suggérer que chaque amélioration des constitutions devrait être précédée d'un discernement communautaire dont l'objet considérait, comme directive ou impérative, l'idée que la révision du même texte, faite avec beaucoup de prudence, serait capable de rendre les normes plus actuelles. Elles pourraient initier la redéfinition des valeurs essentielles de la consécration³¹.

5 — Les éléments nouveaux

Bien que le canon 587, § 3 établisse la formulation des règles et des dispositions légales uniquement en cas de nécessité vraie, l'effort des révisions

³⁰ Cf. POSADA, « Costituzioni. Attenzioni carismatiche », 200.

³¹ Cf. CONGRÉGATION POUR LES RELIGIEUX ET LES INSTITUTS SÉCULIERS, décret *Renovationis causam*, Proemio, 6 janvier 1969, dans AAS, 61 (1969), 107.

s'avère être une occasion providentielle pour introduire les normes décrétant les réalités nouvelles qui exigent une régulation appropriée³². Les motivations de ce choix laissent entrevoir non seulement le parcours historique de la maturation entreprise (au niveau de l'élaboration des normes en question), mais elles révèlent aussi le soin de l'institut de préserver le mieux possible son héritage charismatique et institutionnel. En vérité, c'est l'usage des instituts plus que la doctrine qui attire l'attention et incite à mener les réflexions présentes.

Étant donné que la majorité des instituts affrontent des difficultés relatives à la réduction du nombre de leurs propres membres, il serait plus qu'opportun que les institutions intéressées refassent leur structure ou plutôt introduisent des facilités normatives permettant un souple regroupement de leurs propres forces avec comme objectif de maintenir et de conserver la présence de ce même institut. La question d'une éventuelle unification interinstitutionnelle, quoique prévue par le canon 582, pourrait être agrandie par les juridictions. Cette unification, malgré les distances géographiques et les différences culturelles ou linguistiques, aurait l'opportunité de créer une structure unique et forte qui partagerait les éléments communs tout en atténuant les différences.

Dans un tel contexte, en raison des migrations qui, sans l'ombre d'un doute, révéleront de nouvelles formes de pauvreté, les instituts devront avoir la tâche de répondre efficacement aux besoins, surtout spirituels, de ceux qui, hors de leur propre lieu d'appartenance, vont rechercher des idéaux incarnés par des personnes consacrées. De plus, la susdite question semble être considérablement importante par rapport à la survie ou non-survie des monastères des religieuses contemplatives qui, privées souvent de structures intermédiaires — en tant que fédération ou congrégation — doivent fréquemment recourir au Siège Apostolique — si les problèmes déjà mentionnés se vérifient ou si apparaissent des conflits internes, étant incapables ou se trouvant dans l'impossibilité de résoudre d'une manière constructive une situation fâcheuse. Par conséquent, il serait souhaitable que les structures de médiation soient introduites obligatoirement dans les textes constitutionnels.

La réduction numérique des membres met en relief le problème concernant la voix active et spécialement la voix passive, durant la votation canonique, cruciale pour les décisions de *maioris momenti* pour l'institut. Les constitutions révisées, vu l'état des membres et leur condition psycho-physique, pourraient

³² Il est tout à fait impossible d'introduire dans les constitutions actualisées toutes les normes, surtout celles qui passent pour utiles et essentielles et qui ne le sont pas. Cf. SUGAWARA, « Il ruolo delle Costituzioni », 688-689.

déterminer des critères selon lesquels un membre pourrait être privé de la possibilité d'élire ou d'être élu. Certes, une telle norme — apparemment dangereuse — pourrait exclure l'utilisation fréquente de l'institut juridique de la postulation. D'autre part, elle pourrait préserver l'institut même de tous les genres de décisions forcées par des conditions particulières (souvent malheureusement pathologiques) ou vraiment arbitraires.

Les nouvelles directives du Saint Siècle relatives à l'économie des instituts de vie consacrée et des sociétés de vie apostolique encouragent les susdites communautés à actualiser leurs textes constitutionnels concernant la gestion des biens matériels et du patrimoine stable³³. Selon l'expérience et l'usage du dicastère romain compétent, ce dernier aspect — déterminé et bien défini — devrait être introduit au moins dans le droit propre, en préférant cependant les constitutions au lieu d'autres codes mineurs et directoires particuliers³⁴. En définitive, il est toujours opportun de délibérer de la nécessité ou de la convenance des formulations des nouvelles règles constitutionnelles par rapport à la discipline des membres (des peines comme conséquence de la consommation des délits propres ou des prévarications graves relatives à la consécration religieuse) ou à quelques actes de juridiction administratifs dont l'objet repose sur une meilleure harmonisation des actes rarement vérifiables³⁵.

Conclusion

En conclusion, suite aux réflexions présentées, il est nécessaire de s'attacher aux propositions développées ci-dessus afin de mieux saisir les résultats auxquels on est parvenu tout au long de cet exposé.

Entendues comme guide d'identification charismatique et institutionnelle, les constitutions deviennent dans la vie de chaque membre de l'institut leur

³³ Cf. CONGRÉGATION POUR LES INSTITUTS DE VIE CONSACRÉE ET LES SOCIÉTÉS DE VIE APOSTOLIQUE, lettre circulaire *Lignes d'orientation pour la gestion des biens des Instituts de vie consacrée et les Sociétés de vie apostolique*, 2 août 2014, n. 1.4, Librairie Editrice Vaticana, Rome, 2014.

³⁴ Les codes, les autres directoires ou statuts particuliers doivent considérer et établir des normes exprimées par les canons : 587, §4 ; 597 ; 598, §2 ; 607, §2 ; 617 ; 622 ; 623 ; 624, §2 ; 624, §3 ; 626 ; 627, §2 ; 628, §1 ; 629 ; 630, §2 ; 631, §2 ; 631, §3 ; 632 ; 633, §1 ; 633, §2 ; 636, §2 ; 638, §1 ; 638, §2 ; 641 ; 643, §2 ; 645, §3 ; 650, §1 ; 653, §2 ; 654 ; 655 ; 656, 3° ; 657, §2 ; 658 ; 659, §2 ; 659, §3 ; 663, §3 ; 667, §1 ; 668, §2 ; 668, §3 ; 668, §5 ; 669, §1 ; 684 ; §3 ; 684, §4 ; 696, §2.

³⁵ Cf. canons 624, §3 ; 665, §1 ; 668 ; 682, §2 ; la réadmission à l'institut après le renvoi (norme universelle inexistante).

point de repère ayant la configuration personnelle et communautaire de *sequela Christi*. Afin de rendre cette identification authentique et de répondre pleinement aux exigences du lieu et du temps, le même droit constitutionnel pour chaque institut doit être actualisé sans modifier ou transformer radicalement les éléments essentiels de sa fondation et de sa raison d'être.

L'actualisation des textes constitutionnels ne peut jamais être une expression issue de la mode ou des courants modernes. Elle doit plutôt dériver de la recherche continue de moyens plus adéquats relatifs à l'authenticité de la vie consacrée selon le charisme formalisé.

Étant donné les changements décisifs dans les sociétés — définies comme postmodernes, multiculturelles, pluralistes, marquées par l'utilisation excessive de la technique, etc. — il devient plus que jamais opportun d'adapter quelques normes constitutionnelles qui ne correspondent plus aux besoins d'aujourd'hui.

En conséquence, on a révélé que plusieurs instituts affrontent aujourd'hui bien des problèmes au niveau de la partie pratique des actualisations à effectuer car ils ne sont guère préparés ou restent sans idées claires face à un tel défi. Sans prétendre être exhaustif, on a avancé des propositions méthodologiques et pratiques d'une novélisation du droit constitutionnel propre en mettant en évidence particulièrement de possibles erreurs vérifiables à l'usage.

La plus grande erreur consiste encore dans l'incapacité d'arranger les éléments juridiques avec les éléments théologiques puisque la susdite particularité et spécificité des textes constitutionnels doit être entendue comme un équilibre correct des deux dimensions sans les juxtaposer³⁶.

De plus, il serait possible de proposer des lignes méthodologiques d'orientation concernant des critères selon lesquels chaque institut devrait procéder dans l'hypothèse d'une révision dans un tel sens. En outre, il faudrait mettre en relief la nécessité de l'actualisation de la méthodologie de la réforme dans la stricte dépendance de la tradition, particulièrement en ce qui concerne les instituts pluriséculaires au sein desquels le charisme de fondation s'est développé, raison pour laquelle le même charisme doit être lu totalement, c'est-à-dire à la lumière des évolutions successives.

Pour conclure, il est opportun de souligner que les normes juridiques ne peuvent pas garantir le succès dans le processus de revitalisation de la vie personnelle des membres. Pourtant elles peuvent être un instrument dont l'utilisation sage apportera des fruits au charisme reçu c'est-à-dire une réponse remplie de plénitude et de vérité.

³⁶ Cf. SUGAWARA, « Il ruolo delle costituzioni », 687-689.

ACTS OF THE CHURCH IN RELATION TO TEMPORAL GOODS: THE ORDINARY AND THE EXTRAORDINARY

JOHN A. RENKEN*

SUMMARY — The Code identifies four relationships of the Church to temporal goods: acquisition, retention, administration, and alienation. Each of these relationships implies a specific right, and each right is reflected in a specific power to act. Most acts (of acquisition, retention, administration, and alienation) are *ordinary*, but some are *extraordinary*. An act is extraordinary when the administrator cannot perform it without the involvement of others, whether as individuals or as members of a group. The author identifies specific acts as ordinary or extraordinary.

RÉSUMÉ — Le Code identifie quatre relations de l'Église avec les biens temporels : l'acquisition, la conservation, l'administration et l'aliénation. Chacune de ces relations implique un droit spécifique, et chaque droit se traduit par un pouvoir spécifique d'agir. La plupart des actes (d'acquisition, de conservation, d'administration et d'aliénation) sont *ordinaires*, mais certains sont *extraordinaires*. Un acte est extraordinaire si l'administrateur ne peut pas l'accomplir sans la participation des autres, soit à titre individuel soit en tant que membres d'un groupe. L'auteur identifie des actes spécifiques comme étant ordinaires ou extraordinaires.

Introduction

The 1917 Code identified three relationships of the Church to temporal goods: acquisition, retention, and administration (*CIC/17*, c. 1495 § 1). The 1983 Code specifies a fourth relationship: alienation (*CIC/83*, c. 1254 § 1; see c. 1255). On 19 June 1979, by a vote of 5 (for) to 1 (against), the

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coetus De bonis Ecclesiae temporalibus added this fourth relationship. One consultative body on the 1975 *Schema* had insisted suggested that alienation be specified as a distinct relationship of the Church to temporal goods, because “*alienatio non est actus administrationis*.”¹ Under the 1917 Code, alienation had been considered an act of *extraordinary* administration.²

Properly, today we speak of four distinct relationships of the Church to temporal goods: (1) acquisition; (2) retention;³ (3) administration; and (4) alienation. Canonical exactness and precision dictate that we be careful to distinguish these four relationships properly. “To acquire” means to obtain ownership of goods. “To retain” means to keep goods as possessors. “To administer” means to use goods for their proper purposes, to lead them to bear fruit. “To alienate” means to lose ownership of goods, to convey them to other owners.

These four relationships are four *innate rights* which are expressed in four distinct kinds of acts: acquisition, retention, administration, and alienation. These acts are performed by the administrator of a public juridic person. Most commonly, all these acts are “*ordinary*,” but sometimes an act is “*extraordinary*.” An act is *extraordinary* when the competent ecclesiastical

¹ The report of the meeting explains: “De sententia unius Organi consultationis addi debet in canone: ‘...administrare *et alienare* valent...’, quia alienatio non est actus administrationis. Hanc sententiam favent duo Consultores, dum alii duo sunt contradi, quia alienatio non est nisi actus administrationis etsi extraordinariae. Fit suffragatio an placeat addere verbum ‘alienare’: placet 5, non placet 1.” *Communicationes*, 12 (1980), 396.

² Interestingly, some commentators in the past (and even a few commentators today still) had identified a canon 1295 transaction as an act of alienation *sensu lato*, although indeed it is not an act of alienation but instead an act of *extraordinary* administration. The commentators had based their terminology in *CIC/1917* canon 1533 (which corresponds to *CIC/1983* canon 1295) which distinguished alienation properly so called (*alienatio proprie dicta*) and contracts which can worsen the condition of the Church (implicitly, *alienatio sensu lato*). The former was a true act of alienation whereby ownership was passed to another; the latter was *not* an act of alienation but instead an act of *extraordinary* administration *by its very nature*. Such imprecision should be avoided. Alienation always and only involves the transfer of ownership to another; an act of administration never does.

³ Canon 1 (from which developed promulgated canon 1254 § 1) of the 1977 *Schema Libri V De iure patrimoniali Ecclesiae* had used the term *retinere*, but canon 2 (from which developed promulgated canon 1254 § 2) had used the term *possidere*. On 19 June 1979, the *coetus De bonis Ecclesiae temporalibus* stated its clear preference for the term *retinere*, and said it should replace *possidere* in other canons. *Communicationes*, 12 (1980), 396. Nonetheless, canon 634 § 1 uses *possidere* (not *retinere*) in relation to religious institutes. There is no obvious difference between *retinere* and *possidere*: both intend to convey the same notion.

authority (including the Code itself) indicates that the administrator⁴ needs to receive the involvement of one or more other physical persons, whether as individuals or as members of group, in order to perform the act according to the law.⁵ The competent ecclesiastical authority, in other words, determines that some acts are beyond the ordinary (so, they are *extraordinary*); and, the extraordinary nature of the act (as judged by that competent ecclesiastical authority) demands the involvement of the others before the administrator performs it.

1 — *Acts of Acquisition*

“Acts of acquisition” are acts whereby a juridic person obtains the ownership of temporal goods through “just means of natural or positive law permitted to others” (c. 1259). If temporal goods are acquired by the universal Church, the Apostolic See, or a public juridic person, these temporal goods are then known as “ecclesiastical goods” (c. 1257). Book V identifies several different kinds of acts of acquisition whereby revenue is obtained, most of which are acts of ordinary acquisition. These acts of *ordinary* acquisition concern:

1. appeals (c. 1262)
2. fees for acts of executive power (c. 1264, 1°)
3. fees for the execution of rescripts (c. 1264, 1°)
4. offerings for the administration of sacraments and sacramentals (c. 1264, 2°)
5. special collections: parochial, diocesan, national, universal (c. 1266)
6. prescription (c. 1268-1270)
7. diocesan assistance to the Apostolic See (c. 1271)

⁴ It would be helpful to recall the distinction between terms with the same basic root: administrator, act of administration, and administrative act. An *administrator* is the physical person who acts on behalf of a public juridic person (c. 1279 §1). An *act of administration* is the activity of the administrator which intends to use ecclesiastical goods for their proper purposes, to lead them to bear fruit. An *administrative act* is a singular act issued by a competent person with executive authority in the form of a decree, a precept, or a rescript (c. 35; see cc. 26-93).

⁵ The Code makes reference only to acts of extraordinary *administration* (see c. 1277; see “acts which exceed the limit[s] and manner of ordinary administration in c. 1281 §1-2). The Code itself does *not* make reference to acts involving other relationships of the Church to temporal goods as *extraordinary*. Nonetheless, inasmuch as the Code requires the involvement of others before the administrator can perform such other acts, the Code recognizes that some acts of acquisition, retention, and alienation are also *extraordinary*.

8. benefices, where they still exist (c. 1272)
9. pious trusts (c. 1302)

Other acts of ordinary acquisition, found elsewhere in the Code, involve:

1. “stole fees” (cc. 531, 551)
2. Mass offerings (cc. 945-958)
3. tribunal fees (cc. 1649)

Interestingly, the Code does not make specific reference to so-called “Sunday collections.” Nonetheless, it explains that the diocesan bishop is bound to admonish the faithful to give their temporal goods for the benefit of the Church (c. 1261).

In addition, the Code also identifies some acts of *extraordinary* acquisition. Before one can perform such acts, the involvement of others is required. Acts of extraordinary acquisition are:

1. to impose diocesan taxes, ordinary and extraordinary (c. 1263) – the diocesan bishop must receive the *counsel* of the diocesan finance council and the presbyteral council before imposing a diocesan tax
2. to beg for alms (c. 1265) – one’s own ordinary and the local ordinary must give *written permission* before one begs for alms
3. to accept gifts with a modal obligation or condition attached (c. 1267 §2) – the ordinary must give *permission* before the administrator accepts a gift burdened by a modal obligation or a condition⁶
4. to accept non-autonomous foundation (c. 1304 § 1) – the ordinary must give *permission* for the acceptance of a non-autonomous foundation

2 — Acts of Retention

While the retention of ecclesiastical goods is mentioned in both *CIC/17* canon 1495 § 1 and *CIC/83* canon 1254 § 1, canonists seem not to identify

⁶ Robert T. KENNEDY distinguishes between a gift with a modal obligation and one with an attached condition: “A modal obligation, according to Roman law whence the term is derived, is an obligation undertaken at the time of accepting a gift which is enforceable against the donee but the breach of which does not result in reversion of the gift to the donor. A conditional gift, on the other hand, conditions transfer of ownership upon fulfillment of the condition; breach results in a reversion of ownership to the donor.” “The Temporal Goods of the Church,” in John P. BEAL, James A. CORIDEN, and Thomas J. GREEN (eds.), *New Commentary on the Code of Canon Law*, commissioned by the CANON LAW SOCIETY OF AMERICA, New York, Paulist, 2000, 1469.

any specific “acts of retention.” Perhaps many contend that retention is simply the common and constant responsibility of church administrators in the handling of all goods once they have been acquired, such that acts of retention are identical to acts of administration in practice. In other words, some may hold that “acts of retention” and “acts of administration” are essentially synonyms: both intend to safeguard or protect all the goods which have been legitimately acquired by the Church.

Nonetheless, it seems that there are certain acts, performed by the administrator of a public juridic person, which are performed *precisely* in order that some ecclesiastical goods be retained and safeguarded. Indeed, the Code itself distinguishes “retention” from other relationships of the Church to temporal goods. Logically, it follows that acts of retention are distinct from acts of acquisition, administration, and alienation. As mentioned above, on 19 June 1979, the *coetus De bonis Ecclesiae temporalibus* determined that acts of alienation are to be distinguished from the many acts of administration. Similarly, it seems entirely appropriate to distinguish acts of retention from acts reflecting the other three relationships of the Church to temporal goods.

Among the acts of retention, some obviously result in *permanent* retention: these intend to assure the retention of an ecclesiastical good perpetually, or at least for a long period of time. Other acts of retention are *temporary*: these intend to assure the retention of an ecclesiastical good for a lesser period of time.⁷

2.1 — *Permanent Acts of Retention*

One permanent “act of retention” is the legitimate designation of stable patrimony.⁸ Stable patrimony consists of those ecclesiastical goods which form the secure foundation which enables the public juridic person to continue to exist, performing its proper purpose (see cc. 1254 §2, 114 §§2-3). The legitimate designation of stable patrimony is the preeminent act of retention whereby the administrator clearly, firmly, and permanently retains select ecclesiastical goods in order to ensure the future existence and operation of the public juridic person. The notion of stable patrimony was introduced into

⁷ Perhaps dialogue will continue among canonists from which will emerge a consensus on those activities of the administrator of public juridic persons which constitute “acts of retention.”

⁸ The 1983 Code introduces a *new* and *fundamental* category of *all* ecclesiastical goods: all ecclesiastical goods are either *stable patrimony* or *non-stable patrimony* (see cc. 1285, 1291; see cc. 1295, 1283, 3°).

the 1983 Code in an effort to safeguard ecclesiastical goods, intended for the long-term existence of a public juridic person, from loss through the irresponsible acts of its administrator through alienation (see c. 1291).⁹

It also seems that other acts, commonly understood to be acts of administration, are indeed permanent acts of retention. Examples of these permanent acts of retention are:

1. to establish the funds for clergy support, clergy social benefits, and other purposes (cc. 1274-1275)
2. to assure that the ownership of ecclesiastical goods is protected by civilly valid methods (c. 1284 § 2, 2°)
3. to observe prescripts of canon law, civil law, founders, donors, or legitimate authority, especially so that no damage comes to the Church from the non-observance of civil laws (c. 1284 § 2, 3°)
4. to erect an autonomous pious foundation (c. 1303 § 1, 1°)

None of these *permanent* acts of retention are *extraordinary* since none require the involvement of others before the administrator of the public juridic person can perform them.

⁹ The development of this fundamental category is rooted in the process of the revision in *CIC/1917* canon 1530 § 1 (from which developed canon 1291) which had identified the requirements for alienation of “immovable ecclesiastical goods and movable ecclesiastical goods which can be saved by preserving them” (*res ecclesiasticas immobiles et mobiles, quae servando servari possunt*). The first mention of the concept of “stable patrimony” occurred during the afternoon of 13 May 1968 when one consultant of the *coetus De bonis Ecclesiae temporalibus* suggested that these words be replaced with “goods which pertain stably and legitimately to the patrimony of some moral ecclesiastical person.” He explained his rationale: the purpose of the law is not to hinder the alienation of those things which can be saved by preserving them, but instead to exercise caution lest the stable patrimony of the Church be imprudently dissipated by administrators. He added that money, for example, is a movable good can be saved by preserving it; nonetheless, it remains alienable without the prescribed solemnities until, through a legitimate act, it becomes part of the stable patrimony of the Church. This proposition was generally pleasing to the other consultants. (*Communicationes*, 37 [2005], 120-121) Thereafter, the *relator*, Hercules Crovella, proposed the following formula: “To alienate goods, which by legitimate designation constitute the stable patrimony of some moral ecclesiastical person, requires....” The *relator*’s proposal was pleasing to all the consultants. (*Communicationes*, 37 [2005], 121) That afternoon the *coetus* continued to discuss the revision of *CIC/1917* canon 1530, and completed the formula which had been introduced that morning. The entire proposed formula stated: “To alienate goods which by legitimate designation constitute the stable patrimony of some moral ecclesiastical person, requires the consent of the legitimate superior, without which the alienation is invalid.” (*Communicationes*, 37 [2005], 123)

For further study of the history of the development of “stable patrimony” in the 1983 Code, and of the meaning of the term as understood by canonical commentators, see John A. RENKEN, “The Stable Patrimony of Public Juridic Persons,” in *The Jurist*, 70 (2010), 131-162.

2.2 — *Temporary Acts of Retention*

In addition, the Code identifies certain acts of retention which are *temporary*. These acts include:

1. to collect the return of goods and income accurately and on time, to protect what is collected... (c. 1284 § 2, 4°)
2. to accept a trust and to safeguard its goods (c. 1302; see c. 1303 § 1, 2°, 1302)
3. to reduce Mass obligations, for a just and necessary cause, according to the norms of law (c. 1308)
4. to reduce, moderate, or commute the wills of the faithful for pious causes, for a just and necessary cause, according to the norms of law (c. 1310)

None of these *temporary* acts of retention are *extraordinary* since none require the involvement of others before the competent authority or administrator can perform them. The following *temporary* acts of retention, however, are acts of *extraordinary* retention since they *do* require the involvement of the ordinary before the administrator can act:

1. to invest surplus funds (c. 1284 § 2, 6°) – which requires the *consent* of the ordinary
2. to accept a non-autonomous pious foundation (c. 1303 § 1, 2°; 1304 § 1) – which requires the *written permission* of the ordinary
3. to invest the goods of an endowment (c. 1305; see c. 1303 § 1, 1°) – which requires the *prudent judgment* (*prudens iudicium*), that is, the direction, of the ordinary after he has heard those concerned and his own finance council

2.3 — *Acts of Administration Closely Related to Acts of Retention*

The Code identifies several acts of administration which are very closely related to acts of retention. These acts of (ordinary) administration are intended to assure the continued safeguarding of ecclesiastical goods which are already retained. These acts of administration include:

1. to exercise careful vigilance over the administration of all goods belonging to public juridic persons (done by the ordinary: c. 1276 § 1; see c. 1278)
2. to issue special instructions ordering the entire matter of the administration of ecclesiastical goods (done by the ordinary: c. 1276 § 2)

3. to prepare and to retain regularly updated inventories of ecclesiastical goods (c. 1283, 2°-3°)
4. to exercise vigilance so that ecclesiastical goods entrusted to them are not lost or damaged (c. 1284 § 2, 1°)
5. to take out insurance policies to take care that ecclesiastical goods are not lost or damaged (c. 1284 § 2, 1°)
6. to keep well organized records of receipts and expenses (c. 1284 § 2, 7°)
7. to organize correctly and protecting in a suitable and proper archive the documents and records on which the property rights of the Church or institute are based, and depositing authentic copies of them in the archive of the appropriate curia (c. 1284 § 2, 9°)
8. to put into writing the establishment of a foundation, and to preserve records of it (c. 1306).

3 — Acts of Administration

Book V identifies multiple acts of administration, particularly in its Title II. In fact, the Code identifies more acts of administration than it does acts of acquisition, acts of retention, and acts of alienation.

Indeed, the Code distinguishes three categories of acts of administration: acts of *ordinary* administration; acts of *extraordinary* administration; and, **for dioceses only**, acts of *ordinary* administration *more important in light of the economic condition of the diocese*.¹⁰ And, the Code requires that particular law identify the latter two types of acts of administration (the Code does *not* require that particular law identify any acts of acquisition, acts of retention, or acts of alienation).

An “act of *extraordinary* administration” is an act of administration which exceeds the limit(s) and manner of ordinary administration (see c. 1281 §§ 1-2) and is determined to be such by the competent ecclesiastical authority. As is the case of any extraordinary act, the law *always* requires the administrator of a public juridic person to receive the consent/permission of one or more other physical persons, whether as individuals or as members of group, in order to perform the act of extraordinary administration.

¹⁰ The Code’s category of “acts of [ordinary] administration more important in light of the economic condition” pertains *only* to dioceses. The Code makes no reference to such acts in relation to any other public juridic person. (Nonetheless, it is certainly not excluded that particular law or proper law can establish such a category for public juridic persons other than dioceses.)

3.1 — Acts of Extraordinary Administration *iure universali*

The 1983 Code of Canon Law does not explicitly identify any specific act of extraordinary administration by that term. Nonetheless, inasmuch as an act of extraordinary administration requires the consent/permission of others before the administrator can perform it, a study of the Code identifies five acts of extraordinary administration *iure universali*. Each of these is an act of administration, not “routine,” to perform which the administrator of a public juridic person needs the involvement of one or more other identified physical persons. *De facto*, the following are five acts of extraordinary administration established by the Code for the Latin Church:

1. to refuse gifts of greater importance for a just cause and in matters of greater importance (c. 1267 § 2) – which requires the *permission of the ordinary*
2. to initiate or to contest civil litigation (c. 1288) – which requires the *written permission of the ordinary*
3. to enter threatening contracts involving stable patrimony¹¹

According to canon 1295, if the threatened stable patrimony is valued beyond the minimum amount designated for alienation of stable patrimony (see c. 1292 §§ 1-2): If the diocesan bishop, as administrator of diocesan ecclesiastical goods, intends to enter such a contract, he needs the *consent of the diocesan finance council, the college of consultors, and those concerned*. If the administrator of a public juridic person subject to the diocesan bishop intends to enter such a contract, he or she needs the *consent of the diocesan bishop with the consent of his finance council, the college of consultors, and those concerned*. If the administrator of some other public juridic person wishes to enter such a contract, he or she needs the *consent of the competent authority identified in the statutes*. Moreover, if the amount of the threat surpasses the maximum monetary amount established by the episcopal conference for acts of alienation, all the above-mentioned administrators need also (*insuper*) the *permission of the Holy See*.

According to canon 638 § 3 (and canon 741 § 1): If a religious institute or a society of apostolic life intends to enter *any* threatening contract involving stable patrimony (no matter the amount of the threat), the competent administrator requires the *permission of the competent superior with the consent of the council*. Moreover, if the amount of the threat surpasses the

¹¹ For further reflections on the development and application of canon 1295, see John A. RENKEN, “Contracts Threatening Stable Patrimony: The Discipline and Application of Canon 1295,” in *Studia canonica*, 45 (2011), 501-519.

amount defined by the Holy See for each region, goods given to the Church by a vow, or goods precious for artistic or historic reasons, the administrator need also (*insuper*) the *permission of the Holy See*.

4. to lease ecclesiastical goods (c. 1297) – requires the *permission of competent ecclesiastical authority* as identified by the episcopal conference
5. to erect a new church building, even by a religious institute (c. 1215) – which requires the *consent of the diocesan bishop*, after he has heard the presbyteral council and the rectors of the neighboring churches

These five acts of extraordinary administration are identified *iure universalis*, although the Code does not employ the technical term “act of extraordinary administration” in relation to any one of them.

Further, it would seem that making stable patrimony into non-stable patrimony should be considered, by its nature, to be an act of extraordinary administration *iure universalis*. After all, as mentioned above, the notion of stable patrimony was introduced into the 1983 Code in an effort to safeguard ecclesiastical goods, intended for the long-term existence of a public juridic person, from loss through the irresponsible acts of its administrator through alienation. *Mutatis mutandis* and by analogy, it follows that, inasmuch converting stable patrimony into non-stable patrimony subjects it to loss through routine acts of administration (e.g., paying bills, making purchases, etc.), the conversion itself should be considered so significant an act of administration that it would require the prior written consent of the ordinary – that is, that it would be an act of extraordinary administration by its very nature. It would be helpful if the universal law would *expressly* require permission of higher competent ecclesiastical authority for the conversion of stable patrimony into non-stable patrimony.

3.2 — Acts of Extraordinary Administration *iure particulari*

In addition to the acts of extraordinary administration *iure universalis*, the Code also makes provision for the designation of acts of extraordinary administration *iure particulari*. For dioceses, these are established by the conference of bishops (c. 1277). For public juridic persons subject to the diocesan bishop, these are established by the statutes or by the diocesan bishop after he has received the counsel of the diocesan finance council (c. 1281 § 2). For religious institutes (c. 638 § 1) and societies of apostolic life (c. 741 § 1), these are established by proper law. For other public juridic persons, these are established by the statutes (c. 1281 § 2).

It is important to underscore that the conference of bishops establishes acts of extraordinary administration *only for dioceses* – not for parishes or

other public juridic persons. Therefore, if a diocesan bishop wants the acts of extraordinary administration pertaining to dioceses *also* to pertain to parishes and other public juridic persons subject to him, he must establish these acts of extraordinary administration for the parishes and the others by diocesan particular law.

4 — *Acts of Alienation*

The Code provides universal norms for the act of alienation of stable patrimony in canons 1291-1294, 638 § 3, and 741 § 1. While the acts of acquisition, retention, and administration involve various distinct activities, all acts of alienation involve one thing activity: the conveyance of ownership of ecclesiastical goods to another person, juridic or physical.

We can distinguish between acts of *ordinary* alienation and acts of *extraordinary* alienation.

For all public juridic persons: acts of *ordinary* alienation involve *all* non-stable patrimony which has not been given to the Church by a vow, and which is not precious for artistic or historic reasons.

For public juridic persons other than religious institutes and societies of apostolic life: acts of *ordinary* administration also involve *all* stable patrimony valued below the minimum amount established by law which has not been given to the Church by vow, and which is not precious for artistic or historic reasons. Acts of *extraordinary* alienation involve the alienation of stable patrimony valued above the minimum amount established by law (c. 1292 § 1), goods given to the Church by a vow (c. 1292 § 2), and goods precious for artistic or historical reasons (c. 1292 § 2).¹² Those who must give consent before the administrator can perform an act of *extraordinary* alienation are identified in canon 1292 §§ 1-2.

For a religious institute or a society of apostolic life: acts of *extraordinary* alienation involve everything other than non-stable patrimony which has not been given to the Church by a vow, and which is not precious for artistic or historic reasons. These acts of extraordinary alienation require the *written permission of the competent superior with the consent of the council*. Furthermore, if the stable patrimony is valued beyond the amount defined by the Holy See for the region, or if the property is goods given to the Church by

¹² Nothing prevents the establishment of other acts of *extraordinary* alienation by particular law. Should such acts be thus established, the particular law will identify the others to be involved before the administrator can perform the act of alienation.

a vow or goods precious for artistic or historic reasons, the *permission of the Holy See* is also (*insuper*) required (cc. 638 § 3, 741 § 1).

Conclusion

The Code identifies four innate rights of the Church in relation to temporal goods: the right to acquire, to retain, to administer, and to alienate them. Certain acts correspond to each of these rights. Among these acts, the great majority are *ordinary*, but some are *extraordinary*. The latter are determined to be extraordinary by competent ecclesiastical authority (including the Code itself), and all of these require the involvement of other physical persons, individually or as members of a group, before the administrator can perform the act according to the law.

A proper awareness of these extraordinary acts indicates that some relations of the Church to temporal goods require special attention and care, lest the Church assume inappropriate responsibilities or lose its valuable assets which exist “to order divine worship, to care for the decent support for the clergy and other ministers, and to exercise the works of the sacred apostolate and of charity, especially toward the needy” (c. 1254 § 2; see c. 114 § 2).

AN HISTORICAL SKETCH OF PRINCIPAL DEVELOPMENTS IN THE CANON LAW ON TEMPORAL GOODS

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SUMMARY — Ecclesiastical property can be defined as those secular goods—either corporeal or non-corporeal—which belong either to the Church universal, the Apostolic See, or to other juridical person in the Church. According to St. Augustine, the Church cannot not carry out the care of numerous poor people entrusted to her or provide for their legal defense and legal service without financial support. This disciplinary tradition is the one which up to this day—with some modifications because of the changes which occurred in the Church’s social environment—determines the classification of ecclesiastical goods in the universal Church. The donations of the faithful are indispensable for divine worship, for the service of the clergy, and for the free exercise of the everyday activity and mission of the Church. Numerous normative sources from the different periods of Church history unequivocally underline that the purpose of ecclesiastical property is to secure the Church’s independent and sacred ministry for the salvation of souls.

RÉSUMÉ — Les biens ecclésiastiques peuvent être définis comme les biens séculiers - soit corporel ou non-corporels - qui appartiennent soit à l’Église universelle, le Siège Apostolique, soit à une autre personne juridique dans l’Église. Selon saint Augustin, l’Église ne peut pas effectuer la prise en charge de nombreuses personnes pauvres qui lui sont confiées ni assurer leur défense et leur service juridiques sans soutien financier. Cette tradition disciplinaire valide de nos jours — avec quelques modifications en raison des changements intervenus dans l’environnement social de l’Église — détermine la classification des biens ecclésiastiques dans l’Église universelle. Les dons des fidèles sont indispensables pour le culte divin, le service du clergé et le libre exercice de l’activité quotidienne et de la mission de l’Église. De nombreuses sources

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normatives, provenant des différentes périodes de l'histoire de l'Église, soulignent sans équivoque que le but de la propriété ecclésiastique est l'indépendance de l'Église ainsi que le sacré ministère en vue du salut des âmes.

Introduction

“Satis pia et probabilis quorundam sententia est bona ecclesiastica, cum a SS. Patribus et Conciliis res Dei, et patrimonium Christi dicantur, proxime et immediate esse sub dominio ipsius Dei et Christi, non per metaphoram, sed per omnimodam proprietatem, ita ut sola ipsorum administratio possit hominibus convenire.” This is how it is summed up by *Septimii Vecchiotti* in the repeatedly published text written from the standpoint of *Ioannis Card. Soglia*.¹ The handbooks written before the codification of 1917, as well as the commentaries on that Code, testify to a precise and adequate system which had been already crystallized on the basis of biblical texts. In this systematic division, there are distinct treatments on the system of benefices, the listing of regulations concerning those temporal goods that appear in the framework of the law of patronage, and those canonical instructions that contain the general discipline on the Church's temporal goods.² Here we cannot undertake to review—in the respective periods of the Church's history—the gradually clarified regulation of the disciplinary norms of each listed area. Therefore, this analysis is dedicated primarily to the development of the canonical material of the last of them, which bears the title *De bonis Ecclesiae temporalibus*.³ Its scope was noted by Pope St. Symmachus (498-514) in his extensive passage at the Third Council of Rome in 502, and the text is also found in the *Decretum Gratiani* (D. 96 c. 1).⁴

¹ This article was written at the Saint Michael's Abbey of the Norbertine Fathers (Silverado, CA, USA), in the Collegio S. Norberto (Rome), and in the International Canon Law History Center (Budapest). This research was supported by the OTKA K 106300 and KAP-3.6-14/003 projects. This paper was presented at the Conference of the Hungarian Canon Law Society (Budapest, 7 November 2014).

S. M. VECCHIOTTI, *Institutiones canonicae ex operibus Ioannis Card. Soglia, excerptae et ad usum seminariorum accomodatae*, 17th ed., Augustae Taurinorum, 1878, vol. 2, 81.

² M. CONTE A CORONATA, *Institutiones iuris canonici ad usum utriusque cleri et scholarum*, 4th ed., Taurini-Romae, 1951, vol. 2, 365-516.

³ VECCHIOTTI, *Institutiones canonicae*, 6-24.

⁴ Ae. FRIEDBERG (ed.), *Corpus iuris canonici*, vol. 1, Lipsiae, 1879 (repr. Graz, 1955; hereafter: FRIEDBERG, vol. 1) cols. 335-338; cf. P. JAFFÉ, *Regesta pontificum romanorum ab condita Ecclesia ad annum post Christum natum MCXCVIII*. Ed. secundum curaverunt S. LOEWENFELD (JL: a. 882-1198), F. KALTENBRUNNER (JK: ?-590), P. EWALD (JE: a. 590-882), Lipsiae, 1885 (repr. Graz, 1956) JK ante 757 (473).

1 — *Developments in the Law on Ecclesiastical Goods until Pope St. Gregory the Great (590-604)*

Ecclesiastical goods in the time of Constantine did not constitute a unified body of wealth in the possession of the universal Church but was rather the property of the particular Churches.⁵ The Gospel of Matthew⁶ and the First Letter of St. Paul to the Corinthians⁷ witness that the Church adopted the custom of the tithe. It had the same purpose as the tithes in the Books of Leviticus and Deuteronomy,⁸ that is, to provide for those who carry out the sacred ministry, although the tithe's canonically defined system was developed only between the third and sixth century.⁹ Apart from the New Testament sources that speak about collected offerings laid down at the apostles' feet (Acts 4:34), it was a *separate fiduciary patrimony*, that is, a funeral association, which appeared as the earliest temporal goods of a corporate nature with some ecclesiastical relevance.¹⁰ Beginning in the second century, entombment became more and more frequent in the Roman Empire, and more and more associations (the *collegium funeraticium*) were founded, which provided for its members a predetermined form of funeral.¹¹ The first legally acknowledged Christian personal associations came into being as such groups.¹² The persecution of Christians that began with the decree of Emperor Decius (†251) in December 249 changed the whole practice of burial. Until that time, Christian burial took place in a parcel of a pagan cemetery, but now there began the development of exclusively Christian cemeteries.¹³

⁵ Sz. A. SZUROMI, *Egyházi intézménytörténet*, Bibliotheca Instituti Postgradualis Iuris Canonici Universitatis Catholicae de Petro Pázmány nominatae, I/4, Budapest, 2003, 43-45.

⁶ Mt 10:10.

⁷ 1Cor 9:13.

⁸ Lev 27:30; Dt 12:6, 14:23, 26:12.

⁹ In detail cf. Sz. A. SZUROMI, "Szempontok az egyházi tized rendszerének forrásaihoz és kánonjogtörténeti sajátosságaihoz," in *Magyar Sion*, 49 (2013), 33-48.

¹⁰ Sz. A. SZUROMI, "La discipline d'inhumation du XII^e et XIII^e siècle," in *Rivista internazionale di diritto commune*, 13 (2002), 211-228, especially, 211.

¹¹ Sz. A. SZUROMI, *A temetésre vonatkozó egyházfegyelem a XII-XIII. században*, 2nd ed., Budapest, 2007, 13.

¹² Dig. 47.23.4: P. KRUEGER and T. MOMMSEN (eds.), *Institutiones, Digesta*, Corpus iuris civilis, vol. 1, Berolini, 1905 (repr. Berlin, 1954; Hildesheim, 2008), col. 790; cf. A. FÖLDI and G. HAMZA, *A római jog története és intézményei*, 3rd ed., Budapest, 1998, 229.

¹³ P. LEX, *Das kirchliche Begräbnisrecht historisch-kanonistisch dargestellt*, Regensburg, 1904, 14, 20-21; cf. *Lexikon des Mittelalters*, München-Zürich, 1977-1999 (hereafter: LMA), vol. 1, cols. 1804-1805.

After 313, it was the local Churches—as associations of persons—that were bestowed by the Roman law with juridical personality.¹⁴ According to a provision in the *Codex Theodosianus* from 321,¹⁵ the most holy Catholic Church is capable of acquiring temporal goods by inheritance (C.Th. 16.2.4).¹⁶ The trustee of the Church's goods was the bishop, with the exception of the monasteries where it was the abbot or another major superior. The Council of Antioch in 314 considered it important to emphasize the difference between the goods of the bishop and those of the diocese. The bishop could have disposed freely only of his own personal goods, including the designation of the inheritors. He not only handled the ecclesiastical goods but—because of his ministry—he himself might also have taken his share of them. Nevertheless, as was pronounced in canon 25 of the same council, this had to be done in a way such that the ecclesiastical goods should serve the good of the Church (later diocese) entrusted to him; that the lands be managed properly; and that at his death all the goods must remain in the ownership of the Church. This canon puts special emphasis on the care and provision of the poor.¹⁷ Even in those times, trusteeship had to be reviewable, and the bishop had the obligation to provide oversight in the process of management for the presbyters and deacons. When the office of archdeacon appeared, he became the inspector of diocesan management, as directed by the bishop. The scope of power of this financial administrator was prescribed by the Emperor Justinian in 528, as seen in the *Codex Iustinianus* (Cod. 1.3.32 §4; Cod. 1.3.41 §10).¹⁸ The bishop's decision alone was not enough to alienate ecclesiastical property, for he needed the opinions of the bishops of the province as well as that of the metropolitan. The bishop was not allowed to act

¹⁴ SZUROMI, *Egyházi intézménytörténet*, 43.

¹⁵ T. MOMMSEN and P. M. MEYER (eds.), *Theodosiani libri XVI cum Constitutionibus Sirmondianis et Leges novellae ad Theodosianum pertinentes*, vol. 1/2, Dublin-Zürich, 1904 (repr. 1971).

¹⁶ T. MOMMSEN and P. M. MEYER (eds.), *Theodosiani libri XVI*, 101.

¹⁷ Cf. Sz. A. SZUROMI, *Pre-Gratian Medieval Canonical Collections – Texts, Manuscripts, Concepts*, *Aus Recht und Religion* 18, Berlin, 2014, 33.

¹⁸ Cod. 1.3.41. §. 10: “Ipsos etiam oeconomus cum iudicio ac consideratione creari iubemus scientes omnimodo singulis annis rationes administrationis suae sanctissimo episcopo reddere et, si quo damno res ecclesiasticas affecisse uel in lucrum proprium quid uertisse uisi fuerint, hoc rebus ecclesiasticis restituere debere. Ac si ipsi quidem superstites eiusmodi rationes subierint, tunc quae dicta sunt fient: sin autem defuncti fuerint, antequam rationes reddiderint, tunc heredes eorum eiusmodi quaestioni subiciantur atque ad restitutionem eorum compellantur quaecumque eapropter debere eos consisterit.” P. KRUEGER (ed.), *Codex Iustiniani*, *Corpus iuris civilis*, vol. 2, Berolini, 1906 (repr. Berlin, 1954; Hildesheim 2008), cols. 26-27.

against their opinion. The *Statuta Ecclesiae antiqua* (476-485)¹⁹ was unequivocal in requiring the necessary signatures for the validity of the alienation.²⁰ This authorization could be given even in a council. Canon 4 of the Third Council of Rome in 502, mentioned earlier, declared that the alienation of such real estate without permission is forbidden under penalty of excommunication and, by the same token, is also invalid.²¹ This provision was confirmed by King Theodoric (†526) in 507. With respect to ecclesiastical goods, a provision of the *Codex Theodosianus* 11.16.15-16 was a decisive step, for it granted the Church immunity from the state.²² Likewise significant is the provision of the *Codex Theodosianus* regarding exemption from the burden of taxation (C.Th. 11.16.21; 16.2.40).²³ In parallel with the acknowledgement and support of ecclesiastical activities and institutions, there appeared in Roman law the legal forms of *venerabilis domus*, *venerabilis loca*, *religiosissima loca*, as well as the *piae causae*, all of which would play an important role during the Middle Ages in the development of the ecclesiastical juridical person (e.g., the *hospicium*).²⁴

2 — Developments in the Law on Ecclesiastical Goods in the Middle Ages

In the political situation of the Church, the birth of the Papal State in 756 may be considered a turning point.²⁵ Since the time of the transference of the residence of the Roman emperor to Constantinople, papal power became the decisive factor in Rome. Moreover, wealthy families bequeathed significant lands to the Church, primarily in the area of Rome but also in southern Italy,

¹⁹ Ch. MUNIER (ed.), *Concilia Galliae a 314 – a. 505*, Corpus Christianorum. Series Latina, 148, Turnholti, 1963, 162-188; cf. Sz. A. SZUROMI, *Fejezetek az egyházi jogalkotás történetéből – források és intézmények*, Bibliotheca Instituti Postgradualis Iuris Canonici Universitatis Catholicae de Petro Pázmány nominatae, III/15, Budapest, 2011, 44-45.

²⁰ C. 50: “Irrita erit episcopi uel donatio uel uenditio uel commutatio rei ecclesiasticae absque conuenientia et subscriptione clericorum.” MUNIER (ed.), *Concilia Galliae a 314 – a. 505*, 174.

²¹ I. D. MANSI (ed.), *Sacrorum conciliorum nova et amplissima collectio*, vols. 1-31, Florentinae-Venetiis, 1757-1798 (new edition with continuation: L. PETIT and J.M. MARTIN, vols. 1-60, Paris-Leipzig-Arnheim, 1899-1927; hereafter: MANSI), vol. 8, 267.

²² T. MOMMSEN and P. M. MEYER (eds.), *Theodosiani libri XVI*, 93-94.

²³ T. MOMMSEN and P. M. MEYER (eds.), *Theodosiani libri XVI*, 100-101.

²⁴ Sz. A. SZUROMI, *Egyházi intézménytörténet*, 45.

²⁵ G. KRAUSE and G. MÜLLER (eds.), *Theologische Realenzyklopädie*, vols. 1-36, Berlin-New York, 1977-2004 (hereafter: TRE), vol. 19, 93.

Gaul, Dalmatia, and in Africa. This body of lands was called the *Patrimonium Petri*.²⁶ When the barbarian invasions had ceased and Pepin the Short (†768) took power, the lands that he conquered from the Longobards after his victory over Aitsulf in 756 he handed over—according to the terms of the agreement with Pope Stephen II (752-757)—to the *Patrimonium Petri*.²⁷ Here we do not want to touch upon Constantine's letter of donation and its circle of problems.²⁸ In the eighth century, there were significant properties also in the ownership of newly founded dioceses, abbeys, and parishes. These ecclesiastical goods served the regular daily life of the Church (e.g., expenses of church buildings, their equipment, provision for the clergy, helping the poor, etc). A decisive element in the development of the law on ecclesiastical goods was the *restitutio*, as mentioned in former handbooks²⁹ as well as recent historical works.³⁰ This was the material remedy for damages established by the emperor to ecclesiastical property during the early Middle Ages (e.g., by Pepin the Short), and it included guaranteeing the tithe by the state. Besides this, we can find various privilege-letters which gave exemption from taxation for individual, concrete ecclesiastical institutions—mainly for monasteries.³¹

Together with the problematic and slow solution of the question of investiture, there appeared the papal “reservations” in the provisions for the more important ecclesiastical offices (episcopal sees, major ecclesiastical benefices). Also available were the financial resources that consisted mainly of the income of the Papal State, the papal tithe, and the Peter's pence. In the fourteenth century, the Papal Curia carried out a tax reform characterized by the introduction of new types of taxes.³² One such was the *servitia* or *taxa* that had to be

²⁶ LMA, vol. 6, cols. 1792-1793.

²⁷ E. CASPAR, *Pippin und die römische Kirche*, Berlin, 1914 (repr. 1970).

²⁸ In detail cf. TRE, vol. 8, 196-202. G. GONNET, “La Donazione di Costantino presso gli eretici medioevali,” in *Bollettino della Società di Studi Valdesi*, 132 (1972), 17-29. R-J. LOENERTZ, “En marge du Constitutum Constantini. Contribution à l'histoire du texte,” in *Revue des sciences philosophiques et théologiques*, 59 (1975), 289-294. The critical edition of the donation letter: P. CIPROTTI, *Il 'Constitutum Constantini'*, Università degli Studi di Camerino, Istituto giuridico, Testi per esercitazione, V/1, Milano, 1966. H. FUHRMANN (ed.), *Fontes iuris Germanici antiqui*, Monumenta Germaniae Historica, Fontes iuris, 10, Hannover, 1968.

²⁹ CONTE A CORONATA, *Institutiones iuris canonici*, vol. 2, 453. A. VERMEERSCH and J. CREUSEN, *Epitome iuris canonici cum commentariis ad scholas et ad usum privatum*, 2nd ed., Brugis-Bruxelles, 1925, vol. 2, 431.

³⁰ J. GAUDEMET, *Église et cité. Histoire du droit canonique*, Paris, 1994, 255-257. J. IMBERT, *Les Temps Carolingiens (741-891). L'Église: les institutions*, Histoire du Droit et des Institutions de l'Église en Occident, V/1, Paris, 1994, 12-14.

³¹ Cf. C. BAUER, “Die Epochen der Papstfinanz. Ein Versuch,” in *Historische Zeitschrift*, 138 (1928), 457-503.

³² BAUER, “Die Epochen der Papstfinanz”, 457-503.

paid when one took possession of an ecclesiastical benefice, which amounted to one-third of the annual income of the benefice. Very similar to this was the *annata* whose imposition goes back to the time of Pope Innocent III (1198-1216), the amount of which was always locally regulated by the popes.³³ In fact, it is undoubted that we can read the most circumspect provisions—beyond the material fixed in the *Corpus iuris canonici* (from the *Decretum Gratiani* until the *Extravagantes communes*)—in the text of the Council of Trent (1545-1563) (sessions XXI, XXII, XXIV and XXV),³⁴ although even previous ecumenical councils dealt with questions of property law. It was the ecclesiastical tithe together with the ecclesiastical benefice that provided for the individual parishes to carry out their proper duties. The Council of Trent emphasized, on one hand, that it is the competent local bishop's duty to provide for the proper sustenance of the parish priests of his diocese, even if the income from the benefice, tithe, and donations was not sufficient for the proper functioning of the parish; on the other hand, no alienation of ecclesiastical goods was permitted to harm the interest of the parish or the diocese. Trent prescribed a compulsory oversight of the ecclesiastical goods, which had to be carried out by the dean every third month. In addition, an episcopal or a papal permission was required for the validity of foreclosing a mortgage and also for the organization of almsgiving for needy persons.

The system of law on ecclesiastical property was increasingly crystallized during the Middle Ages (always keeping in mind other, independently regulated norms that arose from the diverse character of this question). The fundamental arrangement of this discipline comprises four topics: acquiring temporal goods,³⁵ managing temporal goods,³⁶ contracts,³⁷ and pious acts.³⁸ This fourfold division was taken over by the 1917 Code as well as in the commentaries on it and subsequently also in the 1983 Code.

³³ J. KÖRMENDY and K. KÖRMENDY and B. HOLL (eds.), *Annatae e Regno Hungariae provenientes in Archivo Secreto Vaticano 1421-1536*, Budapest, 1990, 25-32; cf. LMA, vol. 1, col. 662.

³⁴ *Conc. Tridentinum* (1545-1563), Sessio XXI (16. iul. 1562) *Decretum de reformatione*, cc. 4, 7: *Conciliorum oecumenicorum decreta*, 3rd ed., Bologna, 1973 (hereafter: COD), 729-730, 730-731; Sessio XXII (17 sept. 1562) *Decretum de reformatione*, c. 11: COD, 741; Sessio XXIV (11 nov. 1563) *Decretum de reformatione*, c. 13: COD, 767-768; Sessio XXV (3-4 dec. 1563) *Decretum de reformatione*, c. 12: COD, 792.

³⁵ CONTE A CORONATA, *Institutiones iuris canonici*, vol. 2, 454-482. VERMEERSCH and CREUSEN, *Epitome iuris canonici*, vol. 2, 469-480.

³⁶ CONTE A CORONATA, *Institutiones iuris canonici*, vol. 2, 482-491. VERMEERSCH and CREUSEN, *Epitome iuris canonici*, vol. 2, 480-484.

³⁷ CONTE A CORONATA, *Institutiones iuris canonici*, vol. 2, 491-508. VERMEERSCH and CREUSEN, *Epitome iuris canonici*, vol. 2, 484-495.

³⁸ CONTE A CORONATA, *Institutiones iuris canonici*, vol. 2, 508-516. VERMEERSCH and CREUSEN, *Epitome iuris canonici*, vol. 2, 496-498.

3 — Characteristics of the Law on Ecclesiastical Property

Ecclesiastical property can be defined as those secular goods—either corporative or non-corporative—that belong either to the Church universal, the Apostolic See, or to other juridical persons in the Church. It unequivocally follows that the goods of those lay associations, which do not have juridical personality in the Church, cannot be considered as ecclesiastical goods. Matthaeus Conte a Coronata points out,³⁹ with reference to Arcadio Larraona,⁴⁰ that the temporal goods of religious with simple vows cannot be considered as ecclesiastical goods since they retain ownership of their goods but entrust the management of them to the religious institute or somebody else. Consequently, we may logically conclude that, if they transfer their goods to the institute at the time of perpetual profession, those goods become qualified as ecclesiastical goods, because the institute becomes not only the manager of the goods but also their owner.

When we turn our attention to the canonical material of the *Corpus iuris canonici*, we can see that the corresponding canons of the *Decretum Gratiani* are located primarily in the second part of the collection, in *Causa* 16. Taking over the text of the Council of Toledo of 506, the *Decretum Gratiani* (C. 12 q. 3 c. 3) stated clearly that the Church and the Apostolic See are entitled by native right, freely and independently of the secular power, to acquire, alienate, and manage temporal goods in order to carry out their own purposes. However, not only the universal Church but also her individual *moral*—in modern term *juridical*—persons have the right to acquire, alienate, and manage temporal goods, observing those conditions which are specified by law for validity.⁴¹ This most important principle of Catholic property law received further affirmation with new legal arguments enumerated by Pope Alexander IV (1254-1261) in his letter written in 1257 (VI 3.23.1).⁴² This argument was used by Pope Pius IX (1846-1878) on 15 December 1856,⁴³ and a summary of this

³⁹ “Bona ecclesiastica sunt omnes res temporales sive corporales sive incorporales quae vel ad Ecclesiam universam et ad Apostolicam Sedem, vel ad aliam in Ecclesia personam moralem pertineat.” CONTE A CORONATA, *Institutiones iuris canonici*, vol. 2, 447.

⁴⁰ A. LARRAONA, “Commentarium Codicis Can. 534,” in *Commentarium pro Religiosis*, 13 (1932), 184-195, especially 186.

⁴¹ FRIEDBERG, vol. 1, col. 718.

⁴² Ae. FRIEDBERG (ed.), *Corpus iuris canonici*, vol. 2, Lipsiae, 1881 (repr. Graz, 1955; hereafter: FRIEDBERG, vol. 2), cf. A. POTTHAST (ed.), *Regesta Pontificum Romanorum inde ab a. post Christum natum MCXCVIII ad a. MCCCIV*, vols. 1-2, Berlin, 1875 (repr. Graz, 1957), n. 16308.

⁴³ PIUS IX, Alloc. *Nunquam fore*, 15 dec. 1856, in P. GASPARRI and I. SERÉDI (eds.), *Codicis iuris canonici fontes*, vols. 1-9, Romae, 1923-1939, vol. 2, 911-916.

became *CIC/17* canon 1495.⁴⁴ It is apparent that the relevance of all these legal acts to the law of the State essentially changed in consequence of those modifications to the situation of the Church in society which occurred during the period between the sixth and the eighteenth/nineteenth centuries. In a secularized society, the safeguarding of the Church's rights with respect to temporal goods can be guaranteed primarily by laws on the relation of state and Church which are accepted by the individual countries and by agreements—even concordats—with the Holy See.⁴⁵ This is why canon *CIC/83* 1254 § 1—which follows from canon *CIC/17* 1495—in effect plays an important role as a foundational legal principle for international agreements that concern matters of property law between the Apostolic See and individual countries. An emblematic example of this kind of agreement was made between the Apostolic See and the Republic of Hungary on 20 June 1997, whose modification was signed on 21 October and promulgated with Law CCIX/2013 of Hungary.⁴⁶

St. Augustine wrote in dramatic fashion of the tithe given to the Church in his 219th sermon, which we can read in C. 16 q. 1 c. 66. According to his words, the Church could not attend to and care for the poor people of great number who are entrusted to her or even provide for their legal defense and legal service. Therefore, he said, to offer donations to the Church, which is in fact due to God, is indispensable.⁴⁷ Important—and found in the most ancient tradition of the Church—is therefore that principle of canonical property law that St. Augustine laid down in another sermon, and which is an additional principle of canonical property law quoted in C. 16 q. 1 c. 67 concerning the reason for surrendering the tithe. Accordingly, the donation of the faithful is fundamental for the administration of divine worship, for the service of the clergy, and for freely carrying out the everyday activity and mission of the Church.⁴⁸ This justification is in full harmony with what can be found in the Old Testament concerning the legal background of those prescriptions that provided for the material conditions of the activity of the

⁴⁴ CONTE A CORONATA, *Institutiones iuris canonici*, vol. 2, 449–451. VERMEERSCH and CREUSEN, *Epitome iuris canonici*, vol. 2, 467–468.

⁴⁵ J-P. SCHOUPPE, *Droit canonique des biens*, Collection Gratianus Series, Montréal, Qu. 2008, 30–32.

⁴⁶ About the text of every ratified accord, see J. T. MARTIN DE AGAR (ed.), *Raccolta di Concordati 1950–1999*, Citta del Vaticano, 2000. J. T. MARTIN DE AGAR (ed.), *I Concordati del 2000*, Citta del Vaticano, 2001. Cf. J. M. VIEJO-XIMÉNEZ, “Posición jurídica de la Iglesia católica en el orden internacional,” in *Revista Española de derecho Canónico*, 62 (2005), 145–182. D. NÈMEC, *Concordat Agreements between the Holy See and the Post-Communist Countries (1990–2010)*, Law and Religion Studies, 8, Leuven-Paris-Walpole, MA, 2012.

⁴⁷ FRIEDBERG, vol. 1, col. 784.

⁴⁸ FRIEDBERG, vol. 1, col. 784.

Levities.⁴⁹ Similar is the wording of canon 5 of the Council of Rome in 1059, which is inserted into the *Decretum Gratiani* (C. 16 q. 2 c. 3). It underlines that temporal goods—surrendered to the Church by the faithful either as tithe or as first fruits or by any other form of offering—are ordered to support divine worship for the living and the dead. A bishop, therefore, has a special responsibility for all these goods.⁵⁰

The ecclesiastical sacred ministry in parishes is most conspicuously apparent to Christ's faithful in the administration of the sacraments and sacramentals. Most probably that is why session XXI of the Council of Trent quotes the above-mentioned disposition conjoined with the letter of Pope Alexander (1059-1081)⁵¹—emphasized also in the *Liber extra*—concerning the foundation of parishes, because the functioning of a newly founded parish is viable only if it has the necessary temporal goods.⁵² This reveals the onerous obligation of patrons who must keep in mind not the promotion of their own material interests but that of the parish and its work. The decisive principle that the Council of Trent summarized also took place during the first codification (*CIC/17* c. 1496),⁵³ and was inserted into canon *CIC/83* 1254 § 2.⁵⁴ A recent clear description of the purpose of the Church's temporal goods—founded on the sources of the Church's traditional and disciplinary standpoint—was published in 2013 by Cardinal Velasio DePaolis.⁵⁵

Temporal goods can be acquired in virtue of the natural law or positive law, as explained in detail in the constitution *Alias ad Apostolorum*, which was issued on 30 January 1768 by Pope Clement XIII and was taken over both in *CIC/17* canon 1499 § 1 and *CIC/83* canon 1256.⁵⁶ Here, we must underline that the ownership of ecclesiastical goods is under the supreme authority of the Holy See either directly or indirectly (through juridical

⁴⁹ H. HAAG (ed.), *Bibliai lexikon*, Budapest, 1989, 1831. Sz. A. SZUROMI, *Egy működő szakrális jogrend*, Bibliotheca Instituti Postgradualis Iuris Canonici Universitatis Catholicae de Petro Pázmány nominatae III/16, Budapest, 2013, 124-125.

⁵⁰ FRIEDBERG, vol. 1, col. 786.

⁵¹ X 3.48.3: FRIEDBERG, vol. 2, cols. 652-653; cf. JL 13854 (8919).

⁵² *Conc. Tridentinum* (1545-1563), Sessio XXI (16. iul. 1562) *Decretum de reformatione*, c. 4: COD, 729-730.

⁵³ CONTE A CORONATA, *Institutiones iuris canonici*, vol. 2, 452. VERMEERSCH, and CREUSEN, *Epitome iuris canonici*, vol. 2, 467. Cf. J. BÁNK, *Kánoni jog*, vols. 1-2, Budapest, 1960-1963, vol. 2, 365.

⁵⁴ SCHOUPE, *Droit canonique des biens*, 21-22.

⁵⁵ V. DE PAOLIS, *Note di teologia del diritto*, Facoltà di Diritto Canonico San Pio X, Manuali, 7, Venezia, 2013, 236-237.

⁵⁶ CLEMENS XIII, *Const. Alias ad Apostolorum*, 30 ian. 1768, in GASPARRI and SERÉDI (ed.), *Codicis iuris canonici fontes*, vol. 2, 614-620, especially 614-616, 619-620 (§§ 1, 5, 7, 13).

persons of the Church). The ecclesiastical tradition and its legal interpretation show a constant unity. The sources derive this from the *suprema auctoritas* of the Holy See. We can find this supreme ownership already in a letter (C. 12 q. 1 c. 19)⁵⁷ attributed to Pope Urban I (222-230), but it is given expression also in canons 6⁵⁸ and 51⁵⁹ of the *Concilium Agatensi* of the year 506. Further, we must mention the letter of Pope Innocent III (1198-1216) written in 1199 to the bishop of Trent (X 1.2.7)⁶⁰ and also the definition of Pope Alexander III (1159-1181) published in the *Liber extra* (X 1.41.1),⁶¹ as well as the extensive statement of Pope Paul II (1464-1471) on the alienation of ecclesiastical goods, which can be found in the *Extravagantes communes*.⁶² In relation to this question, St. Thomas Aquinas says: “Res Ecclesiae sunt Papae, ut principalis dispensatoris, non ut domini et possessoris.”⁶³ Concerning all this, the Council of Trent summarizes these previous documents in stating that this supreme power extends not only over ecclesiastical goods managed by clerics but also over those that are in the hands of religious or lay associations (i.e., ecclesiastical associations). It is because of this special responsibility that it is necessary to make an annual record and regular visitations of those persons and institutions that exercise the management of temporal goods.⁶⁴ We must further mention the prestigious declaration or letter *Cum encyclicas*⁶⁵ of Pope Benedict XIV (1740-1758),⁶⁶ whose knowledge of canon law was outstanding. It is not by chance that this fundamental definition in an abbreviated form can be read in *CIC/17* canon 1499 § 2 and is quoted by *CIC/83* canon 1256 almost word for word.⁶⁷

It is worthwhile to survey those respective categories of ecclesiastical temporal goods which were accurately explained in the *Liber sextus*. This

⁵⁷ FRIEDBERG, vol. 1, cols. 682-683; cf. JL †98 (lxxi).

⁵⁸ C. 12 q. 3 c. 3: FRIEDBERG, vol. 1, cols. 713-714.

⁵⁹ C. 12 q. 5 c. 5: FRIEDBERG, vol. 1, col. 716.

⁶⁰ X. 1.2.7: FRIEDBERG, vol. 2, col. 9; cf. POTTHAST (ed.), *Regesta Pontificum Romanorum*, n. 641.

⁶¹ FRIEDBERG, vol. 2, cols. 222-223.

⁶² Extrav. Com. 3.4.un: FRIEDBERG, vol. 2, col. 1269.

⁶³ S. THOMAS AQUINAS, *Summa Theologica*, II-II. q. 100 art. 1 ad 7.

⁶⁴ *Conc. Tridentinum* (1545-1563), Sessio XXII (17 sept. 1562) *Decretum de reformatione*, c. 11: COD, 741.

⁶⁵ BENEDICTUS XIV, Ep. *Cum encyclicas*, 24 mai. 1754, in GASPARRI and SERÉDI (ed.), *Codicis iuris canonici fontes*, vol. 2, 426-431, especially 427-428, 431 (§§ 4, 9).

⁶⁶ *Sanctissimi Domini Nostri Benedicti Papae XIV. Constitutiones selectae nec non bullae, decreta, epistolae, &c.*, Venetiis, 1773. *Sanctissimi Domini Nostri Benedicti Papae XIV. De Synodo dioecesana libri tredecim*, Venetiis, 1775.

⁶⁷ In detail cf. Sz. A. SZUROMI, “Megjegyzések az egyházi vagyon tulajdonjogának korlátaihoz,” in *Kánonjog*, 2 (2000), 117-119.

division receives its systematic ordering in Session VI of the Council of Trent founded on the canons quoted in the *Extravagantes Iohannis* and in the *Extravagantes communes*. This disciplinary tradition is the one which up to this day determines the classification of ecclesiastical goods in the universal Church, albeit with some modifications because of the changes that occurred in the Church's social environment. On these bases we can differentiate the following categories⁶⁸: 1) goods that consist of corporeal (*corporealia*) or non-corporeal (*incorporalia*) aggregates, or in other words, either of an aggregate of persons, or of an aggregate of things (assets, rights, acts, or services); 2) goods that are immovable estates (*immobilia*), i.e., house, land, etc, or chattels (*mobilia*); 3) sacred things (*sacra*), which have received consecration or blessing for divine worship, in contrast with those others which have remain profane, according to the wording of Franz Xavier Wernz, S.J. (†1914);⁶⁹ and finally, 4) goods that are precious (*pretiosa*), which have value by some quality (artistic, historical, derived from their being bound to a sacred act or person) that in fact cannot be expressed merely materially. In addition, we can distinguish the category of secular (*saecularia*) or religious (*religiosa*) goods which belong or do not belong to the Holy See or its organizational units (*consistorialia – non consistorialia*). This latter class is used already in the *Liber Sextus* (VI 3.4.5)⁷⁰ on the foundation of Pope Boniface VIII (1294-1303), but we can find further sources both inside the *Corpus iuris canonici* (especially in relation to the ecclesiastical landed property and religious goods),⁷¹ and in the provisions of the Council of Trent⁷² up to *CIC/17 canon 1411*.⁷³

Finally, there emerges the topic of the legal state of pious dispositions, which developed together with both the universal and the particular ecclesiastical legislation. These are either independent (*causa pia*) or dependent (*pia fundatio*) in character.⁷⁴ The former is a *separate fiduciary patrimony* whose subject is the property itself, and it always has juridical personality. Various ecclesiastical institutions belonged to this category. The second cat-

⁶⁸ CONTE A CORONATA, *Institutiones iuris canonici*, vol. 2, 448.

⁶⁹ F. X. WERNZ, *Ius decretalium ad usum praelectionum in scholis textus canonici sive iuris decretalium*, vols. 1-6, Romae, 1894-1914, vol. 3, 134.

⁷⁰ FRIEDBERG, vol. 2, col. 1022.

⁷¹ Extrav. Ioh. XXII 3. un.: FRIEDBERG, vol. 2, cols. 1207-1209. Extrav. Com. 3.2.4: FRIEDBERG, vol. 2, cols. 1259-1261.

⁷² *Conc. Tridentinum* (1545-1563), Sessio VI (13 ian. 1547) *Decretum de residentia episcoporum et aliorum inferiorum*, cap. II: COD, 682-683.

⁷³ S. HAERING and H. SCHMITZ (eds.), *Diccionario enciclopédico de Derecho Canónico*, transl. R. H. BERNET, Spanish ed. I. P. DE HEREDIA and V. J. L. LLAQUET, Barcelona, 2008, 89-92.

⁷⁴ Cf. BANK, *Kánoni jog*, vol. 2, 372.

egory signified a kind of property that was entrusted to a juridical person which had to provide from its income for predetermined acts of divine worship or other kinds of religious acts.⁷⁵ The above-mentioned ecclesiastical pious institutions—which obviously differ from both the lay and the pious lay institutions—could come into being in such a way that they as institutions were not juridical personas, but they were entrusted to an ecclesiastical juridical person.⁷⁶ These juridical persons were called in canon law *persona fiduciaria* or *fidei commissoria*.⁷⁷ Their establishment could occur in such a way that the competent ecclesiastical authority endowed the institution itself with juridical personality.⁷⁸ This resulted in a number of forms of pious foundations, to which was applied—based on the general principles of ecclesiastical property law—the characteristic of being either corporeal (*corporalia*) (associate chapter, religious order, confraternity, etc)⁷⁹ or non-corporeal (*incorporalia*). In case the property ceased to exist, the obligations undertaken by a juridical person also ceased. Canon 1303 of the 1983 Code, in comparison to the provisions of the 1917 Code, uses a different typology. Therefore, the above-mentioned foundations do not have *ipso facto* juridical personality, except those which had it before 27 November 1983.

Conclusion

This short historical, doctrinal, and disciplinary survey of ecclesiastical property law well signifies the clear foundation of the development of ecclesiastical property, its function, management, as well as the contribution of Christ's faithful to ecclesiastical finances. This law on temporal goods was in no way intended to create an economical system of a parallel society. The numerous normative sources aligned from the different periods of Church history unequivocally underline that the purpose of ecclesiastical property is to secure the Church's independent and sacred ministry for the salvation of souls. That is why we cannot identify with the viewpoint that living in

⁷⁵ R. NAZ (ed.), *Dictionnaire de Droit Canonique*, vol. 6, Paris, 1957, cols. 395-400.

⁷⁶ L. KECSKÉS, *Magyar polgári jog. Általános rész II. A személyek joga*, Institutiones Juris, Budapest-Pécs, 1999, 164-166.

⁷⁷ E. EICHMANN and K. MÖRSDORF, *Lehrbuch des Kirchenrechts auf Grund des Codex Iuris Canonici*, Paderborn, 1953, vol. 2, 457-461.

⁷⁸ CIC/17 Can. 100 – § 1. Catholica Ecclesia et Apostolica Sedes moralis personae rationem habent ex ipsa ordinatione divina; ceterae inferiores personae morales in Ecclesia eam sortiuntur sive ex ipso iuris praescriptio sive ex speciali competentis Superioris ecclesiastici concessionem data per formale decretum ad finem religiosum vel caritativum.

⁷⁹ BÁNK, *Kánoni jog*, vol. 1, 356-357.

poverty in the Church means primarily the expression of solidarity toward people of poor circumstances. The Church's purpose is to proclaim the Gospel and to administer the sacraments and sacramentals for all people without regard to their social and material situation, thus promoting the spiritual salvation of the whole of humankind.⁸⁰ It has happened in numerous cases that too great an emphasis on temporal goods jeopardized the very purpose that Jesus entrusted on his Church. This, however, does not mean that poverty is a means of solidarity, but rather it expresses the obligation of Christians to prefer the value of eternal goods and to be bound to them rather than to temporal goods. This sums up the correct understanding of poverty; caring for the poor ones who live on the periphery of society becomes authentic only with this. Therefore, the doctrinal and disciplinary unity in the Church's teaching that goes back to Christ himself cannot be dissolved. It has always dedicated special attention to the defense and even the vindication of the rights of the poor. Thus, the purpose of ecclesiastical property has in the past been to guarantee the worthy performance of the sacred ministry, and it remains so also in the present.

⁸⁰ Cf. Y. SUGAWARA, "Beni ecclesiastici e loro finalità nel Codice di Diritto Canonico," in *Sequela Christi*, 40/1 (2014), 104-113, especially 112.

JURISPRUDENCE I

JUST AND EQUITABLE SUBSIDY TO AN EXCLAUSTRATED RELIGIOUS

Sentence *coram* Jaeger, 20 March 2013 (Mexico)¹

1 — *The Facts*

1. Sister Gracia Sanchez, born on 29 December 1938, now the petitioner in the case, made her perpetual profession in 1961 in the religious congregation of the Sisters of Perpetual Adoration of Guadalupe, which she had entered in 1953. However, in 1983, she, also at the request of the Supreme Moderator, that is, Superior General of the same religious institute, petitioned for the indult of exclaustation for reason of treatment for her sickness. And on 31 July 1984, the competent Congregation of the Curia kindly deigned to grant this indult “as long as the necessity lasted.” Furthermore, the Congregation exhorted or offered the Superior General of the Institute “some directives” so that she may fulfill her duty by visiting the religious member and by providing her “whatever was necessary for the treatment and support,” so that the religious living with her parents “would not be a worry for her parents,” because her exclaustated status being a favour, the religious continues to be a member of her Institute.

However, on 15 May 1991 the petitioner presented a *libellus* to this Apostolic Tribunal by which she brought her Institute to trial in order to vindicate, what she alleged, the rights acquired or to be recognized because of her religious profession particularly according to the declarations of the Dicastery concerning her relationship with the Institute during the exclaustation; and the petitioner claimed that the Institute neglected these alleged rights by failing to provide her sufficient economic assistance, including moral

¹ Sentence *c.* Jaeger, 20 March 2013 (Mexico); Prot. No. 21.685. English trans. by Rev. Augustine Mendonça, JCD. Translated and published with permission of the Dean of the Roman Rota. For all preceding Rotal decisions on this case, see *Studia canonica*, 47/2 (2013), 479-526.

support. By its decree of 5 February 1992, the Rotal *Turnus coram* Bruno (B. 4/92) decided that the *libellus* was not to be admitted “due to certain incompetence of Our Apostolic Tribunal,” because it concerns “an administrative issue,” over which the competent administrative Dicastery, and in fact the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life, had already claimed competence.

After a recourse was interposed, the following Rotal *Turnus coram* Pompedda, by its decree of 25 November 1992 (B. 71/92), determined that the cause was in fact judicial in nature and that the Rota was competent and therefore the *libellus* must be admitted. Moreover, at the instance of the petitioner, by his decree of 23 July 1993, the *Ponens* ordered the Respondent to pay the petitioner a provisional daily allowance of fifteen (15) US Dollars. Then, on 16 December 1993 the object of the trial was determined by this tribunal as follows: “1) Whether and how the moral and spiritual support due to the petitioner must be provided by the respondent; 2) Whether or how the physical and psychological medical treatments necessary for the petitioner must be provided by the same respondent party; 3) Whether and how much the respondent party must pay to the petitioner under the title of food allowance.”

On 26 July 1999, the Respondent presented, through its newly appointed *ex officio* advocate, an exception of absolute incompetence on the basis of canon 1400, §2 proposing a plaint of nullity against the above mentioned decree of the *Turnus* of 25 November 1992, which had declared that there was proof of competence of the Rota. Meanwhile, the new *Ponens* López-Illana determined by his decree of 15 December 1999 that “the sum of daily food allowance for the time being” must be raised “to US \$25 (twenty-five),” but “without prejudice to the definitive decision.” And on 29 December 1999, the Respondent insisted on the revocation of this decree, alleging that it is an “alteration of the dispute” and issued only improperly while the exception of incompetence and plaint of nullity against the decree of the *Turnus* of 25 November 1992 were pending. During the session convoked for 17 November 2000 to decide: a) on the irremediable nullity arising from canon 1620, 4° of the decree of the *Turnus* of 25 November 1992; b) on the exception of absolute incompetence of the Roman Rota according to canon 1400, §2; c) on the nullity of the decree of 15 December 1999 which had raised the food allowance; d) on the suspension of the cause, the issue being remitted to the Dicastery, the *Turnus* decreed only “Delayed and a response would be given in the next session of the Auditors”; and the next session was held on 25 November 2000, without arriving at any decision. The matter was rather referred to the Dean so that the number of Auditors may be increased.

Finally, after bypassing other issues, the Decree of the *Turnus coram* López-Illana, which had been raised to five Judges, was issued on 26 January 2001 (B. Bis 12/01), by which “the Auditors Judges of the *Turnus* declared their incompetence according to canons 1400, §2, 1460, 1461 and 1591.” As a result “any further intervention on the part of the Tribunal over the proposed questions” ceased without having to consider the “overturning” “of the preceding Decree of 25 November 1992 by which the *libellus* was admitted,” but its “revocation,” and indeed “after weighing the matter more carefully and after obtaining new arguments and documents.”

2. The Promoter of Justice of Our Apostolic Tribunal, like the petitioner, placed recourse before the following *Turnus* against the decree of the *Turnus* of 26 January 2001. The Respondent however proposed an exception of an adjudged matter (*res iudicata*) on 21 December 2001, since “absolute incompetence of the Apostolic Tribunal of the Roman Rota had been declared twice, namely by the Rotal decree *coram* Bruno of 5 February 1992 and the Rotal decree *coram* López-Illana of 26 January 2001.”

Finally, the questions to which the following *Turnus* had to respond were stated as follows: “Whether the right to appeal against the Rotal Decree *coram* López-Illana issued on 26 January 2001 should be acknowledged in light of the provision of canon 1629, 3°; and should the response be affirmative, whether there is proof of competence of this Apostolic Tribunal.” By its decree of 6 June 2002, the *Turnus* of five Judges *coram* Boccafola (B. Bis 45/02) responded affirmatively to both questions, that is, there is proof of both the right to appeal and the competence of the Roman Rota in the case, thus overturning the decree *coram* López-Illana of 26 January 2001 and remitting the cause to the *Turnus* “*a quo*.” And against this decree, the Respondent approached the Supreme Tribunal of the Apostolic Signatura seeking *restitutio in integrum* and proposing a plaint of nullity, but, by its decree of 26 February 2004 (Prot. N. 33781/02 CG), the Supreme Tribunal rejected both the petition for *restitutio in integrum* and plaint of nullity.

In the meantime however the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life, by its decree of 15 June 2001 (Prot. N. 57905/83), revoked the indult of exclaustation granted to the petitioner because, under the regime of the revised Code of Canon Law promulgated in 1983 and now in force, it is no longer necessary that an exclaustated religious member remains exclaustated by which he or she could legitimately live outside the house of the institute for treatment of an illness as long as the necessity lasts and the permission granted (according to canon 656, §1) by the competent Superior of the institute is sufficient. For this reason, in the very act of notification of the revocation of the favour of exclaustation,

the Dicastery informed the petitioner “from this day onwards,” the permissions, which she might want, must be sought from the Superior General of the Institute.

Through a certain alleged curator constituted in Mexico in August 2001, the petitioner placed recourse before the Supreme Tribunal of the Apostolic Signatura against the revocation of the exlaustration, supported by totally unusual reasons, particularly that the Dicastery could not legitimately revoke an exlaustration while the cause concerning the consequences of the same favour granted previously was pending before the Roman Rota so that the revocation would have been only “a subterfuge to deprive her [namely the petitioner] the small allowance.”

On 28 April 2005, the Supreme Tribunal, by its decree (Prot. N. 32654/01 CA) did not decide on the merit of the recourse but declared the termination of the controversy “because of the cessation of the matter of contention,” since it was evident to it that the petitioner had returned “to the convent the previous year”; therefore she had in fact accepted the revocation of the exlaustration by fulfilling the consequent obligation of living common life in the house of the Institute; and the petitioner herself admitted in her letter of 10 May 2005 to her curator and advocate at the Rota saying that she had returned to the house of the Institute on 11 April 2004 and at the same time she had left the house of the Institute on 2 May 2005, without mentioning the permission granted or at least sought. Those who claimed to represent the petitioner approached the Supreme Tribunal more than once seeking a change in its decision, but in vain.

3. With the revocation of the rescript of exlaustration, which was in fact based on one sole cause, the controversy concerning its legitimacy was declared resolved. And because the petitioner had on her own abandoned again common life, to which she had returned, to live outside the house of the Institute without permission, on 16 May 2005 the petitioner’s curator, who was also her advocate at the Rota, insisted on changing the formula of doubt (corresponding to what was determined on 16 December 1993) to the following: “1. Whether and how appropriate moral and spiritual assistance must be provided to the petitioner by the Respondent party; 2) Whether and how medical, physical and psychological treatments necessary for the petitioner must be offered by the same Respondent party; 3) Whether or not there is proof of petitioner’s right to an allowance not less than daily US \$25.00 from the date of the presentation of the *libellus*, because of equitable value of money (monetary revaluation) and interest from 1 January 2000.” The Respondent however insisted on resolving first the proposed question concerning the nullity of the decree of 15 December 1999 of the

Ponens, but the curator of the petitioner, who is also her advocate, opposed this and on his part insisted that the new *Ponens*—in the place of the one preceding, who had become emeritus—rather confirm the same decree and urge its execution, that is, its implementation.

While the issues remitted to the *Turnus* were pending, the decree of the *Turnus coram* Erlebach of 10 March 2006 (B. Bis 24/06) decreed that there was no proof of nullity of the decree of the *Ponens* of 23 July 1993, respectively of 15 December 1999, but the decree of the *Ponens* of 15 December 1999 “has no force under the present circumstances,” because of the revocation of the rescript, wherefore the sustenance of the religious would have been provided by the Institute “through common life,” and not “through daily financial allowance.” The decree continues, should a controversy arise “within the context of common life of a religious community,” this must be resolved “according to the norm of law via the administrative process, and then through a contentious-administrative process,” with a totally peculiar “basis of a relationship existing between a member and the superior, the rights of a member in such a case do not enjoy the protection through a simply judicial, that is, contentious process.”

The curator/advocate, the decree *coram* Erlebach notes, sought confirmation of the decree of the *Ponens* issued on 15 December 1999, that is, during the time when the rescript of exclaustation was in force. At that time the petitioner was legitimately living outside the enclosure and the institute was obliged to provide for her daily needs outside the home and common life of the Institute. But in the meantime the circumstances changed radically. Admonishing the petitioner, who was living outside the house of the Institute without permission, “to abide by the duties of her state,” the decree *coram* Erlebach notes that the same religious could always seek from the competent Superior of the Institute the permission for absence from the house of the Institute as long as it is still desired or desired again for the purpose of treating the illness. And in this case, the Institute is certainly bound to provide for her necessities, but in accord with the law so that the controversies which might perhaps arise about the matter are resolved only through an administrative procedure. In fact, it recalls this incidental statement, “In fact, any religious can formally claim his or her right before the legitimate superior; should this be formally refused or denied solely through silence, one can have recourse in accord with the norm of law through the administrative process” (ibid. nn. 12-13; Summ., Vol. II, pag. 10). And after making these statements, the decree of the *Turnus* notes that it simply seems that the question or the cause “no longer has any procedural foundation today” (ibid., pag. 59, n. 4). But all these things are necessarily said only “in passing.”

This is because, as regards the possibility of the cause, so to speak, in a situation that has changed fundamentally, it would not have been instituted formally—why, we know not.

4. On 2 October 2006, the petitioner's curator/advocate again insisted on joining the doubt anew, this time under the formula: "whether and how much must be paid to the petitioner by the Institute" (Summ., vol. II, p. 63; cf. also *ibid.*, p. 65). The very same formula of words was proposed through her advocate by the Respondent in her instance received on 7 October 2006 (cf. Summ., vol. II, pag. 64).

Anyway the Promoter of Justice of Our Apostolic Tribunal, by his *votum* of 18 October 2006, thought that the trial no longer had any object, particularly because the question of food allowance existed only under the title of exclausturation. But, once the rescript of exclausturation was revoked, the question of economic assistance, if and how much is owed to the religious who is illegitimately absent, not unlike others, which concern the mutual rights and obligations of the religious and of the institute, can be resolved only through an administrative process (cf. Summ., vol. II, pag. 72-73).

5. By the decree of the *Ponens* issued on 13 November 2006, "after carefully considering canon 1514 and the reasons provided in the decree issued on 10 March 2006," "a totally new object of the trial is determined [...] to be resolved through a definitive sentence, namely: '*Whether and how much should be paid to the petitioner by the Institute*'." Then followed the instruction of the cause through written declarations of the petitioner, through the judicial deposition of the Respondent Superior General, through the examination of five witnesses and through plenty of documents added to the acts. Finally, after the acts were published, defence briefs were exchanged, the *votum* of the new Promoter of Justice of Our Apostolic Tribunal was presented, and after considering everything that must be considered, the *Turnus coram* Arellano, now the *Ponens*, pronounced on 18 October 2011 a definitive sentence responding to the stated doubt: "*Affirmatively to the first, that is, the pension with the attached social obligations must be paid by the Institute. To the second, the amount of daily allowance is US \$27.*"

6. On 14 May 2012, the Respondent (who had received the sentence only on the 9th of the same month) interposed an appeal through its advocate. On 29 May 2012, the *Ponens coram quo* the sentence was pronounced decreed that the appealed cause must be transmitted "to the following *Turnus*," and a *Turnus* of five Judges, with the undersigned as *Ponens*, was constituted by the decree of the Dean of 3 July 2012. By his decree of 17 July 2012, the undersigned *Ponens*, after receiving the *votum* of the Promoter of Justice of Our Apostolic Tribunal, invited the advocate of the respondent to prosecute

the appeal and to press for the joinder of issue, which the advocate did in good time. By his decree of 3 August 2012, the *Ponens* determined that the doubt on which this cause would be judged in this grade of trial would be as follows: “*Whether the Rotal Sentence of 18 October 2011 should be confirmed or overturned, that is: whether, and to the extent affirmative, how much, should be paid to the petitioner by the Institute.*”

In order to serve justice and equity, that is to say, so that the defence of the petitioner may try to put forth a satisfactory response to the argument of the Respondent, which was proposed by the defence of the Respondent party for overturning the prior Rotal sentence, and which the same defence considered to be of great importance, by his decree of the same day 3 August 2012, the *Ponens* communicated, among other things, the following to the curator/advocate of the petitioner: “*we specifically ask you to take note of the statement of the Respondent party that the petitioning party is illegitimately living outside the house of the Institute, that is, without the permission of the Superiors—whether in fact this is in conformity with the truth, the petitioner being absent from the house of the Institute without permission, or the petitioning party contradicts it (either because she really resides in the house of the Institute or because she has obtained the permission of the Superiors, which shall be presented)*” (Summ. Alt., pag. 37).

On 12 October 2012, the petitioner’s curator/advocate insisted, according to the norm of canon 1650, §2, on the “execution of the provisional” Rotal sentence of the first grade (Summ. Alt., pag. 42), and by his decree of 30 October 2012, which was supported by motives, the *Ponens* refused to accept this request (Summ. Alt., pag. 47). The same day, 12 October 2012, the curator/advocate of the petitioner requested “for health reasons” that he be substituted in his functions, and the *Ponens* considered the request worthy of acceptance because of the respect owed to the highly esteemed practitioner of canon law and in fact of this “distinguished tribunal.” And acceding to this request, the Dean of the Roman Rota, by his decree of 13 November 2012, deputed *ex officio* Advocate Luigi Gianfranco in the place of Giovanni Pazzi.

7. Since the advocates of both parties declared, to the question posed by the *Ponens*, that they were not going to seek any supplementary instruction (cf. Summ. Alt., p. 49 and, respectively, p. 10), by his decree of 14 December 2012, the *Ponens* ordered the publication of the acts and determined the time period for further steps, even by convoking the session of the *Turnus* for defining the cause. After the defence briefs were exchanged and all other formalities required by law have been completed, today it is our task to respond to the doubt determined in this second grade of trial.

2 — *The Law*

8. Religious life stands out among the various forms of consecrated life (cfr. can. 605). Through religious life “the religious brings to perfection a total self-giving as a sacrifice offered to God, through which his or her whole existence becomes a continuous worship of God in charity” (can. 607, §1). In fact, one attains this not separately, that is, singly, but as a member of a certain religious institute, which “is a society in which members, according to the proper law, pronounce public vows [...] and lead a life of brothers or sisters in common” (can. 607, §2). Fraternal life to be lived in common in fact distinguishes religious institutes from other institutes of consecrated life, that is, from secular institutes. Fraternal life must be really lived by all members of consecrated life of any kind of institutes (cfr. can. 602), but to live “in common” is proper to religious, not unlike “separation from the world” (can. 607, §3), with which it is by its very nature intimately linked. Indeed, “A religious community must live in a legitimately established house under the authority of a superior designated according to the norm of law,” which is to have “at least an oratory in which the Eucharist is to be celebrated and reserved so that it is truly the centre of the community” (can. 608). Because the fraternal life is required to be lived out in

2 — *In iure*

8. Inter varias vitae consecratae formas (cf. can. 605) eminet vita religiosa, qua “religiosus plenam suam consummat donationem veluti sacrificium Deo oblatum, quo tota ipsius existentia fit continuus Dei cultus in caritate” (can. 607, §1), et quidem non seorsum seu singillatim verum ut sodalis certi instituti religiosi, quod “est societas in qua sodales secundum ius proprium vota publica [...] nuncupant atque vitam fraternam in communi ducunt” (can. 607, §2). Vita enim fraterna in communi ducenda instituta religiosa a ceteris vitae consecratae institutis seu ab institutis saecularibus distinguit. Vita enim fraterna omnibus vitae consecratae cuiusvis generis institutorum sodalibus ducenda est (cf. can. 602) at eam ducere “in communi” proprium est religiosorum, haud secus ac “separatio a mundo” (cf. can. 607, §3), quacum ipsa rei natura arcte connectitur. Enimvero “[c]ommunitas religiosa habitare debet in domo legitime constituta sub auctoritate Superioris ad normam iuris designati,” quae habeat “saltem oratorium, in quo Eucharistia celebretur et asservetur ut vere sit centrum communitatis” (can. 608). Cum enim vita fraterna in communi, seu “vita communis,” in domo instituti ducenda requiratur ab ipsa vitae religiosae specifica indole, “[r]eligiosi in propria domo religiosa habitent vitam communem

common, that is, “common life,” in the house of an institute in virtue of the specific nature of religious life itself, “the religious are to live in their own religious house observing common life,” and they are not to be absent from it “except with the permission of their superior” (can. 665, §1), but never without the permission.

9. In view of the close intrinsic link between religious state and common life to be lived out in the house of the institute, the permission for “long absence from the house” is a more serious affair and in fact not even the superior of the house to which the religious is ascribed can grant it; rather the universal law reserves this faculty to the major superior, and even the major superior cannot grant such a permission even if he or she is certain that it has been requested “for a just cause” “without the consent of the council.” However, “for the purpose of treatment of illness” (likewise “for the purpose of studies or of exercising an apostolate in the name of the institute”), the major superior, with the consent of the council, “can permit a member to live outside a house of the institute” even beyond one year, and indeed as long as the cause or reason lasts (cf. can. 665, §1).

Should a member of a religious institute be absent from the house of the institute without the permission of the competent superior, and in fact illegitimately “for six months,” he or she can be dismissed from the

servantes,” a qua domo ne discedant “nisi de licentia sui Superioris” (can. 665, §1), numquam autem sine licentia.

9. Attenta arcta coniunctione intrinseca inter statum religiosum et vitam communem in domo instituti ducendam, licentia pro “diuturna a domo absentia” negotium est gravius et ne Superior quidem domus, cui religiosus ascribitur sodalis, eam concedere valet; potius ius universale hanc facultatem reservat Superiori maiori, qui et ipse eiusmodi licentiam, etiamsi sibi ipsi constiterit eam “iusta de causa” petitam esse, concedere nequit nisi “de consensu sui consilii”. Attamen “causa infirmitatis curandae” (item “ratione studiorum aut apostolatus exercendi nomine instituti”), Superior maior de consensu sui consilii “sodali concedere potest ut extra domum instituti degere possit” etiam ultra annum, et quidem perdurante causa seu ratione (cf. can. 665, §1).

Quodsi religiosi instituti sodalis sine competentis Superioris licentia, et quidem illegitime, a domo Instituti absens “per semestre” evaserit, ipse ab instituto dimitti poterit (cf. can. 696 § 1), haud secus ac sodalis qui

institute (cf. can. 696, §1), not unlike a member who habitually neglects the obligations of consecrated life, or repeatedly violates the sacred bonds, or stubbornly refuses to obey the legitimate precepts of superiors in grave matter, or causes grave scandal through his or her culpable behaviour, or stubbornly upholds or diffuses doctrines condemned by the magisterium of the Church, or publicly adheres to ideologies infected by materialism or atheism (cf. *ibid.*). The placement of illegitimate absence from the house of the institute in this list among the crimes and very serious violations of laws, that is, obligations, explains the gravity of such an absence. And by this absence, as we saw above, not just this or that single precept but a certain fundamental requirement of religious life together with another still more serious obligation is violated, and this is of obedience, which a religious had pledged in the very act which constituted him or her as such, namely by the act of profession.

10. “A [religious] institute must supply the members with all those things which are necessary to achieve the purpose of their vocation, according to the norm of the constitutions” (can. 670; cf. can. 619 concerning Superiors, who are “to meet the personal needs of the members”). And “all” those things certainly comprise in a very special

obligationum vitae consecratae habitualiter neglexerit, aut iterate sacra vincula violaverit, aut pertinaciter legitimis praescriptis Superiorum in materia gravi oboedire recusaverit, aut grave scandalum ex culpabili suo modo agendi causaverit, aut pertinaciter doctrinas ab Ecclesiae magisterio damnatas sustentaverit vel diffuderit, aut publice ideologiis materialismo vel atheismo infectis adhaeserit (cf. *ibid.*). Conlocatio absentiae illegitimae ab instituti domo in hoc elencho inter scelera et legum seu obligationum graviores omnino violationes sub luce ponit gravitatem istiusmodi absentiae, qua, ut superius vidimus, violatur non hoc vel illud singulum praeceptum verum fundamentale quoddam vitae religiosae requisitum una cum alio adhuc multo graviore, quod est illud oboedientiae, quam religiosus in ipso actu qui eum ut talem constituerit, actu nempe professionis, voverit.

10. “Institutum [religiosum] debet sodalibus suppeditare omnia quae ad normam constitutionum necessaria sunt ad suae vocationis finem assequendum” (can. 670; cf. can. 619 de Superioribus, qui sodalium “necessitatibus personalibus subveniant”), quae “omnia” certo certius complectuntur imprimis media sustentationis sive “alimenta,” cum sodales vi

way the means of sustenance or “food,” because members in virtue of their religious profession either totally lose the very capacity of acquiring and possessing goods (cf. can. 668, §5) or at least they are no longer able to freely dispose of the goods whose ownership they are not able to retain (cf. can. 668, §2), according to the nature of any institute; and particularly because whatever a religious acquires through any title or manner, is at least ordinarily acquired for the institute (cf. can. 668, §3).

Finally, the “right” of a member to sustenance, namely in order that the institute may offer assistance in his or her needs through the ministry of superiors, clearly arises and continues only by reason of religious life, which the member leads in the institute, to whose care he or she has given him or her self over totally, and in fact in the house of the institute “under the authority of a Superior” (cf. can. 608), living without abandoning it by going elsewhere and residing there without the permission of the Superior.

It would certainly be absurd that a religious member solely on his or her own will abandons common living, without the permission of the superiors, and without even asking for it, by withdrawing self from the authority of Superiors to live wherever he or she prefers to live outside the house of the institute, and at the

professionis religiosae aut bonis, quae sua fuerant, plene renuntiaverint capacitatem ipsam acquirendi et possidendi amittentes (cf. can. 668, §5) vel saltem de bonis quorum proprietatem retinere valuerint amplius libere disponere non valeant (cf. can. 668, §2), pro cuiusque instituti natura et iure proprio; et praesertim cum quidquid religiosus quovis titulo vel modo adquirat, ordinarie saltem instituto adquiratur (cf. can. 668, §3).

Plane denique sodalis “ius” ad sustentationem, ut scilicet eius necessitatibus institutum per ministerium Superiorum subveniat, nonnisi ratione vitae religiosae exurgit et manet, quam sodalis ducat in instituto, cuius curae ipse se totum tradiderit, et quidem in instituti domo, “sub auctoritate Superioris” (cf. can. 608) vivens quin eam nisi de licentia Superiorum relinquat alibi se conferens ibique degens.

Absurdum utique esset religiosum sodalem sua sola sponte, absque Superiorum licentia, quam ne expetiverit quidem, a Superiorum auctoritate se subducens vitam communem deserre, extra domum instituti ubi maluerit degere, et simul ius vindicare ad certam “pensionemalimentarem” ei ab instituto utcumque solvendam.

same time to claim the right to a certain amount of “food allowance” to be somehow given to him or her by the institute.

Certainly the relationship between a religious and the institute would be improperly regarded as some kind of contract between two private parties, but in this precise context—namely of mutual obligations of one party toward the other flowing from the religious profession in an institute, the analogy with a situation in which a party, who refuses to fulfill the obligations toward the other party, may nevertheless vindicate to self the right that the other party fulfill his or her obligations, does not seem useless.

Indeed, superiors “are to seek out solicitously and help in returning and in persevering in his or her vocation” (cf. can. 665, §2) a religious who is illegitimately absent from the house of the institute, but certainly are not to assist in his or her continuance in his or her disobedience by supplying the means, by which, having completely abandoned fraternal life in common, he or she is enabled to remain obstinately for an indefinite period of time in a state of grave sin (at least objectively). In fact, as already recalled above, a prolonged—namely protracted for six months—illegitimate absence of a member from the house of the institute is listed among the more serious improper behaviours, because of which a member can be dismissed from the institute (cf. can. 696, §1).

Verum necessitudo religiosum inter et institutum improprie veluti quidam privatorum contractus consideraretur, ast in hoc subtili contextu — mutuarum nempe unius erga alterum obligationum ex professione religiosa in instituto promanantium haud inutilis videtur analogia cum rerum statu, in quo pars, quae suas recuset adimplere erga alteram partem obligationes nihilo setius sibi ius vindicet ut altera pars suas potius impleat.

Sodalem enim, qui illegitime a domo instituti absit, Superiores “sollicite quaerant et adiuvent ut redeat et in sua vocatione perseveret” (cf. can. 665, §2), minime autem adiuvent ut in sua inoboedientia perseveret ei media suppeditando, quibus extra domum, vita fraterna in communi prorsus derelicta, in statu gravis peccati (saltem obiective) ad indefinitum tempus obstinate manere valeat. Immo, sicut supra iam memoratum est, diuturna — per semestre scilicet protracta — sodalis ab instituti domo illegitima absentia inter graviores non recte se gerendi modos adnumeratur, ob quos sodalis ab instituto dimitti potest (cf. can. 696, §1).

11. Listed among the obligations of Superiors of religious institutes towards their members is the care of their sick members; thus canon 619 states: “[Superiors] are to solicitously care for and visit the sick.” One can understand that the treatment of a sickness, in a particular case, suggests the absence of the member from the religious house, for which, as recalled above, the Supreme Legislator explicitly provides in canon 665, §1. He confers on the Superior the faculty to grant permission, with the consent of his or her council, to a religious member “for the purpose of caring for ill health” to live outside the house even “for more than a year,” and in fact even longer, namely as long as the necessity lasts. Determination of such a state of necessity is clearly in the hands of the major Superior and his or her council, whose permission, respectively consent, anyway is required. Certainly, the major Superior is bound to weigh with great kindness such a petition for permission, because Superiors “are to exercise their power, received from God through the ministry of the Church,” only “in a spirit of service,” so that “they are to govern their subjects as sons or daughters of God” and “listen to them willingly.”

However, after willingly and kindly listening to their subjects, the Superiors’ “authority to decide and prescribe what must be done” always

11. *Inter religiosorum Superiorum institutorum erga sodales obligationes adnumeratur infirmorum cura sodalium; ita can. 619: “[Superiores] infirmos sollicitè curent et visitent”. Mente concipi potest infirmitatem, in casu particulari, curandam sodalis a religiosa domo absentiam suadere, cui, ut superius memoratur, Summus explicite providet Legislator in can. 665, §1 cum Superiori maiori conferat facultatem licentiam, de consensu sui consilii, concedendi religioso sodali “causa infirmitatis curandae” extra instituti domum degendi etiam “ultra annum”, et quidem etiam diu, necessitate nempe perdurante. Aestimatio status eiusmodi necessitatis plane penes Superiorem maiorem suumque consilium est, cuius licentia, respective consensus, utcumque requiritur. Certo certius Superior maior magna humanitate petitionem huiusmodi licentiam perpendere tenetur, cum Superiores “suam potestatem a Deo per ministerium Ecclesiae receptam” nonnisi “in spiritu servitii” exercere teneantur, ita ut “subditos regant uti filios Dei” eosque “libenter audiant.”*

Attamen, subditis libenter humaneque auditis, Superiorum “auctoritas decernendi et praecipiendi quae agenda sunt” firma semper manet

remains firm (cfr. can. 618), particularly when it is a matter of granting permissions (or not), which allow an exception of great importance to the norms. Clearly, when a requested permission is denied, a religious member can still make recourse to higher authority, not unlike in other cases, in which subjects consider themselves unjustly harmed by an act of public administrative authority in the Church below the Supreme authority. Specifically, a member of a religious institute can have recourse from a major Superior of a province to the Supreme Moderator of the institute (cfr. cann. 620-622), and from the Supreme Moderator of the institute to the Holy See, namely to the competent Congregation, which generally is the one “for Institutes of consecrated life and Societies of apostolic life” (cf. art. 108, §1 PB), and from this Congregation there is further recourse to the Supreme Tribunal of the Apostolic Signatura according to the norm of law, “whenever it is contended that the impugned act violated some law either in the decision-making process or in the procedure used” (cf. art. 123, §1 PB), always keeping before one’s eyes that the Supreme Pontiff himself is the highest Superior of the religious (cf. can. 590, §§ 1-2).

The concession or denial of the permission is an administrative act, which pertains to the sphere of discretion of the exercise of administrative power. Anyway, it is evident that a religious member, who thinks that “in

(cf. can. 618), praesertim cum de licentiis agatur concedendis (vel minus), quae exceptionem maioris momenti normis permittant. Plane, expetita licentia negata, religiosus sodalis ad superiorem adhuc auctoritatem recurrere poterit, haud secus ac in ceteris casibus, in quibus subditi actu potestatis publicae administrativae in Ecclesia infra supremam se iniuste gravatos putent. In specie, instituti religiosi sodalis a Superiore maiore provinciae ad Supremum instituti Moderatorem (cf. cann. 620-622) recurrere potest, et a Supremo instituti Moderatore ad Sanctam Sedem, ad competentem scilicet Congregationem, quae plerumque est illa “pro Institutis vitae consecratae et Societatibus vitae apostolicae” (cf. art. 108, §1 PB), a qua Congregatione ulterius ad Supremum Tribunal Signaturae Apostolicae datur ad normam iuris recursus, “quoties contendatur num actus impugnatus legem aliquam in decernendo vel in procedendo violaverit” (cf. art. 123, §1 PB), prae oculis semper habito esse ipsum Summum Pontificem supremum religiosorum Superiorem (cf. can. 590, §§1-2).

Licentiae enim concessio vel denegatio actus administrativus est, qui ad sphaeram discretionis exercitii potestatis administrativae pertinet. Utcumque patet religiosum sodalem, qui se “causa infirmitatis curandae” extra

order to seek treatment” he or she needs to live outside the house of the institute, is able to do this legitimately only with the permission granted in accord with the norm of law; he or she can have recourse to superior authority against the denial of the permission, but he or she can never grant to self such a permission without seriously violating the obligations which are inherent to the religious state and as a result his or her relationship with the institute flowing from his or her profession would be completely put at risk and, following the norms of law, it could be terminated.

12. The obligation of common life, that is, of living in a house of the institute, is suspended for a long period of time not only with the permission of the Major Superior with the consent of his or her council granted in accord with the norm of law but also by exclaustation mentioned in canons 686-687, which is generally granted as a favour, although sometimes, according to the norm of canon 686, §3, it can be imposed; and this provision is quite distinct from the permission to live outside the house of the institute mentioned in canon 665, §1. For, a religious living outside the house of the institute with such a permission is dispensed only from the obligation of common life in the house of the institute, but not from all other duties of his or her state, while all obligations of the institute itself toward the member remian.

instituti domum versari debere putet, nonnisi de licentia ad normam iuris concessa legitime hoc facere valere, adversus licentiae denegationem ad superiorem auctoritatem recurrere posse, at numquam sibimetipsi eiusmodi licentiam dare posse quin tam graviter obligationes statui religioso inhaerentes violet ut ipsa sua cum instituto necessitudo ex professione manans in discrimen vocetur omnino et, positis ponendis, terminari possit.

12. Obligatio vitae communis, seu in instituti domo commorandi, in diuturnum tempus suspenditur non solum Superioris maioris de consensu sui consilii ad normam iuris concessa licentia verum etiam exclaustatione, de qua in cann. 686-687, quae plerumque in gratiam conceditur, etiamsi quandoque, ad normam can. 686, §3 imponi potest; quaeque a licentia extra domum instituti degendi, de qua in can. 665, §1 funditus distinguitur. Nam religiosus de eiusmodi licentia extra instituti domum degens a sola vitae communis in instituti domo obligatione dispensatur, non autem a ceteris omnibus status sui officiis, instituti ipsius erga sodalem obligationibus integris omnibus manentibus.

However, exclaustation is situated by the Legislator among the species of “separation” of members from the institute (in *CIC*, Book II, Part III, Section I, Tit. II, Chapter VI). It is in fact situated among the modes of “departure from the institute” (cf. *ibid.*, Art. 2). An exclaustated religious, while remaining radically a member of the institute to which he or she continues to remain incorporated in virtue of religious profession (cf. can. 654), nevertheless, as far as the rights and obligations are concerned, he or she is partially separated from the institute, so that, for example, he or she lacks the active and passive voice (cf. can. 687 compared with can. 654) and is not necessarily permitted to wear the habit of the institute (cf. can. 687). In fact, the one exclaustated is in “a new condition of life” (cf. *ibid.*), which is in fact distinguished from that which is proper to the religious state and, on account of which, he or she “is considered freed from the obligations, which cannot be reconciled with [the same] new condition of his or her life” (*ibid.*). But, unlike definitive departure from religious life (cf. especially cann. 692 and 701), the one exclaustated certainly bound by his or her vows “remains dependent upon and under the care of superiors” (can. 687), with due regard for the freedom “from the obligations which cannot be reconciled with the new condition of his or her life.” (*ibid.*).

Exclaustatio vero inter species “separationis” sodalium ab instituto a Legislatore conlocatur (in *CIC*, Lib. II, Parte III, Sezione I, Tit. II, Capite VI), immo inter modos “egressus ab instituto” (cf. *ibid.*, Art. 2), cum religiosus exclaustatus, dum in radice membrum maneat instituti cui vi professionis religiosae incorporatus pergit (cf. can. 654), ad iura et obligationes quod attinet a professione manantia nihilo setius ab instituto partim separatur, ita ut, ex. gr., voce activa et passiva careat (cf. can. 687 coll. cum can. 654) et non necessario habitum instituti deferre sibi liceat (cf. can. 687); immo exclaustatus in “nova vitae condicione” versatur (cf. *ibid.*), quae quidem ab ea statui religioso propria distinguitur et cuius causa ille “exoneratus habetur ab obligationibus, quae cum [eadem] nova suae vitae condicione componi nequeunt” (*ibid.*). Tamen, secus ac a religione definitive egressus (cf. praesertim cann. 692 et 701), exclaustatus votis utique ligatus “sub dependentia et cura manet suorum Superiorum” (can. 687), salva quidem exoneratione “ab obligationibus, quae cum nova suae vitae condicione componi nequeunt” (*ibid.*).

13. What might be those “obligations” which “cannot be reconciled with the new condition of life” of an exclaustreated person, and how can the freedom from such obligations be reconciled with the state of remaining “under the dependence and care” of the Superiors will have to be seen in each individual case according to the peculiar circumstances and the proper law of the institute, especially according to the mind and praxis of the Roman Curia and decrees or instructions perhaps given by It, likewise the precepts or indications attached fittingly to each and every indult for each case.

Anyway, having considered the residence outside the house of the institute, and in fact separated from the “common table” where religious are nourished, by the very nature of the matter, the one exclaustreated,—unlike other religious whose “condition of life” may be more fully in conformity with the religious state—ought to enjoy practical autonomy in economic and particularly financial matters, either what he or she might have acquired through personal efforts or by saving and frugally using what might have come to him or her by way of social assistance or from some other similar source, or, for example, by using the monthly financial subsidy for personal needs, which the institute had determined to offer the exclaustreated person in this particular case because of numerous

13. Quaenam sint istae “obligationes,” quae cum exclaustreati “nova vitae condicione componi nequeunt,” et quomodo exoneratio ab eiusmodi obligationibus re componatur cum statu manendi “sub dependentia et cura” instituti Superiorum, in singulis casibus — iuxta pecuniaria rerum adiuncta et ius instituti proprium at potissimum iuxta mentem et praxim Romanae Curiae et decreta vel instructiones ab Ea forte data, item praecepta aut indicationes singulis indultis pro opportunitate adnexa — videndum erit.

Ut cumque, visa commoratione extra instituti domum, et quidem separatione a “mensa communi” qua religiosi aluntur, ex ipsa rei natura exclaustreatus — secus ac ceteri religiosi cuius “vitae condicio” statui religioso plenius conformetur — practica autonomia gaudeat oportet in re oeconomica et praesertim nummaria, sive quod propria adquisiverit industria vel quod sibi socialis subventionis ratione aliave huiusmodi obvenerit retinendo et convenienter adhibendo, sive ex. gr. menstruo nummario subsidio pro suis necessitatibus utendo, quod in casu particulari ob nimias exclaustreati veras necessitates eiusve incapacitatem operis praestandi institutum ei tradendum statuerit. Ast cum tota ratio et finis nummarii eiusmodi subsidii vel oeconomicorum auxiliorum,

real special needs of the one exclaust-rated or because of his or her incap-acity to work. But because the sole reason and purpose of such a finan-cial subsidy or economic assistance, which we are dealing with, is the only practical means of sustenance of the one exclaust-rated, one cannot mentally fathom that such sums are owed to the one exclaust-rated on the basis of some acquired right so that he or she acquires, possesses and retains the right to those accumu-lated sums although when they were designated they were really not given to the exclaust-rated person as if they were equivalent to some “sal-ary” owed to a labourer for the work he or she had done.

The present Dean of the Roman Rota states as follows: “The exclaust-rated religious enjoys a freedom that is much wider than the religious who has the leave of absence [...] But he or she is not permitted to amass money in any manner, because of the temporary character of the indult of exclaust-ration” (Pio Vito Pinto, “Exclaust-ratio et absentia a domo des religieuses,” in *Studia canonica*, 11 [1977], pp. 389-402, here at p. 395, n. 8). This is valid—according to the opinion of the same author—also with regard to what pertains to the fruit of his or her own labour (cf. *ibid.*). That the institute is not obliged or bound to give such assist-ance on its own accord but at the order of some superior authority, does

de quibus agitur, nonnisi exclaust-rati practica sustentatio sit, mente con-cipi nequit eiusmodi summas tam-quam ex iure aliquo adquisito exclaust-rato deberi, ita ut ius ad eas cumulas adquirat, habeat et retineat etiam si cum statuta essent reapse ei tradita non sint, quasi scilicet aequiparentur alicui “salarii” oper-ario pro opere, quod praestiterit, deb-ito.

Ita qui nunc Exc.mus est Romanae Rotae Decanus: “La religieuse exclaust-rée jouit d’une liberté plus ample que la religieuse en permis-sion d’absence [...] Mais il ne lui est pas permis de cumuler l’argent en aucune manière, étant donné le caractère temporaire de l’indult d’exclaust-ration” (Pio Vito Pinto, “Exclaust-ratio et absentia a domo des religieuses,” in *Studia canonica*, 11 [1977], pp. 389-402, hic p. 395, n. 8); quod valet — eiusdem Aucto-ris sententia — etiam ad fructus quod attinet exclaust-rati suiipsius operis (cf. *ibid.*). Quod institutum non sponte verum praecipiente ali-qua superiore auctoritate eiusmodi auxilia concedere teneatur vel adstrictum sit, modo memoratum

not in any way change their purpose and nature we have just recalled.

Certainly, it would still be difficult to understand that an institute is bound to pay the accumulated sums of money to a member when exclaustation is no longer in force, namely when even a partial “otherness” “duality,” or more correctly “separation” between the institute and the member, which would necessarily and in accord with the norm of law exist during exclaustation, would have ceased completely. In fact, when exclaustation has ended and the juridic condition of the member has turned ordinary again, that is, “according to the norm” (in common parlance, “normalized”), there would be no sense in discussing such a monetary debt to the member on the part of the institute, because whatever the member might have acquired or may acquire was acquired or is acquired only for the institute.

14. Anyway, a member never has the right to monetary sums, much less to definite sums, which have been perhaps determined to be given to that member for sustenance. Clearly a member while living life in common has the right that the institute provide for him or her all means, which “are necessary to achieve the purpose of their vocation according to the norm of the constitution” (cf. can. 670); so that the Superiors may carry out their office of governing a member as a “son or daughter of God,” indeed with kindness and charity, even when

eorum finem et naturam minime mutat.

Certo certius adhuc minus mente conciperetur institutum eiusmodi cumulas summas exclaustatione non amplius vigente sodali solvere debere, cum scilicet etiam partialis quidem practica illa “alteritas,” “dualitas,” seu rectius “separatio” institutum inter et sodalem, quae perdurante exclaustatione necessario et ad normam iuris vigeret, omnino iam cessaverit. Immo, cum exclaustatio cessaverit et iuridica sodalis condicio denuo ordinaria seu “ad normam” facta sit (vulgo, “normalizzata”), nec sensum quidem umquam haberet loqui de instituti debito eiusmodi nummario erga sodalem, cum quod sodalis adquisiverit vel adquirat nonnisi instituto adquisitum sit vel adquiratur.

14. Utcumque sodalis numquam ius habet ad summas numarias, eo vel minus definitas, quae eius sustentationis causa ei tradendae forte sint statutae. Plane sodalis cum vitam ducet in communi ius habet ut institutum ei suppeditet ea omnia media, quae “ad normam constitutionum necessaria sunt ad suae vocationis finem assequendum” (cf. can. 670); ita ut Superiores officium suum impleant eum nonnisi ut “filium Dei” regendi, humanitate quidem et caritate, etiam cum auctoritatem suam exercent “decernendi et praeciendi

they exercise their authority “to decide and prescribe what must be done” (cf. can. 618). But we are dealing with rights, which are not subject to “quantification,” because their “quantity” and “quality” is found within the realm of that discretion, which is proper to administrative authority.

In the canonical juridic order (in Italian, “ordinamento”), recourse against the acts or omissions of an administrative authority (and to this genus of power is at least likened the authority of religious Superiors, which is certainly public, cf. can. 596, §§1 and 3; as to the public nature of the power of religious Superiors, cf. Pontificia Commissio Codici iuris canonici recognoscendo, Ex officio Response in: *Relatio complectens synthesim animadversionum ab Em.mis atque Exc.mis Patribus Commissionis ad novissimum Schema Codicis iuris canonici exhibitarum, cum responsionibus a Secretaria et consultoribus datis*, in Civitate Vaticana, Typis polyglottis Vaticanis, 1981, p. 140) is possible to the “hierarchical” superior, who can substitute his or her decision for that of the inferior authority without ascertaining its legitimacy, and finally, when question may arise concerning the legitimacy of the decision of the Dicastery of the Roman Curia itself, appeal can be lodged via “contentious-administrative” process to the Supreme Tribunal of the Apostolic Signatura.

quae agenda sunt” (cf. can. 618). Agitur tamen de iuribus, quae “quantificationi” haud sint obnoxia, cum eorum “quantitas” et “qualitas” in ambitu inveniatu exercitii illius discretionis, quae propria est auctoritatis administrativae.

In ordine iuridico (italice, “ordinamento”) canonico adversus actus vel omissiones auctoritatis administrativae (cui potestatis generi auctoritas Superiorum religiosorum, quae utique publica est, saltem adsimilatur; cf. can. 596 §§1 et 3; de publica natura potestatis Superiorum religiosorum, conf. Responsio ex officio, in Pontificia Commissio Codici iuris canonici recognoscendo, *Relatio complectens synthesim animadversionum ab Em.mis atque Exc.mis Patribus Commissionis ad novissimum Schema Codicis iuris canonici exhibitarum, cum responsionibus a Secretaria et consultoribus datis*, in Civitate Vaticana, Typis polyglottis Vaticanis, 1981, p. 140) recursus datur ad superiorem “hierarchicum”, qui suum iudicium ei auctoritatis inferiori substituere valeat quin de huius illegitimate constiterit, et postremo, cum de ipsa legitimitate decisionis ipsius Romanae Curiae Dicasterii oriatur quaestio, appellari potest per viam “contentiosam-administrativam” ad Supremum Signaturae Apostolicae Tribunal.

As we are apprised in the decree of the Rotal Turnus of 10 March 2006 (B. Bis 24/06) coram Erlebach: “Since the controversies, which arise within the context of common life of a religious community, must be resolved according to the norm of law via the administrative process, precisely through contentious-administrative process, because of the relationship which exists between a member and the superior, the rights of a member in such a case do not enjoy the protection through a simply judicial, that is, contentious process.” What is said in the Decree coram Erlebach, because it subtly deals with “controversies, which arise within the context of common life of a religious community,” it seems that certainly one cannot per se exclude the possibility that a dispute between an exclaustated member and the institute can be at least directed in the interim to the judicial forum.

15. Exclaustation separates the member from the institute only partly and for a time, but unfortunately it can also happen in the meantime that a religious may be definitively or simply separated from the institute, to which he or she is definitively incorporated, or in favour or through an indult granted according to the request of the member or through dismissal from the institute decreed in accord with the norm of law (cf. cann. 691-704). In neither case a member has any right to request anything from the

Sicut edocemur in Rotalis Turni Decreto diei 10 martii 2006 (B. Bis 24 /06), coram Erlebach: “Cum autem controversiae ortae in ambitu vitae communis alicuius communitatis religiosae resolvendae sint ad normam iuris in via administrativa, denique contentioso-administrativa, ratione relationis quae adest inter sodalem et superiorem, iura sodalium non gaudent tali in casu protectione per viam simpliciter iudicalem seu contentiosam.” Quod Decreti coram Erlebach dictum, cum subtiliter de “controversiis ortis in ambitu vitae communis” agat, per se minime a priori excludere videtur fieri posse ut res inter exclaustatum et institutum ad forum iudiciale interdum saltem deduci valeant.

15. Exclaustatio nonnisi partim et ad tempus sodalem ab instituto separat, ast pro dolor interdum fieri potest etiam ut religiosus ab instituto, cui definitive incorporatus sit, definitive seu simpliciter separetur, aut in gratiam seu per indultum iuxta ipsius sodalis preces concessum aut per dimissionem ab instituto ad normam iuris decretam (cf. cann. 691-704). In neutro casu sodalis aliquod habet ius ullum ab instituto repetendi (cf. can. 702, §1), quod re vera patet omnino si consideretur indoles ipsa

institute (cf. can. 702 §1), which is clearly evident if one were to consider the very nature of religious life and profession. In both cases however the Supreme Legislator invites the institute to observe “equity and evangelical charity [...] toward a member who is separated from it” (cf. can. 702, §2).

Indeed, this exhortation of the Legislator, nay a precept, imposes an obligation on an institute, but does not confer a right upon a member separated from it, which he or she can judicially vindicate. It offers an opportunity by arguing “a fortiori” in favour of exercising real “equity and evangelical charity” towards an exclaustated member, who is only partly and temporarily, but not radically nor definitively, separated from the institute. But this does not benefit a religious who is illegitimately absent from the house of the institute. For, unlike the one exclaustated, those to whom an indult to leave the institute may have been granted, similarly those dismissed from the institute, according to the norm of law, that is, legitimately live outside the house of the institute. In fact, those definitively separated necessarily live completely outside the home of the institute nor are they able to return, because their “vows as well as rights and obligations flowing from the profession” have completely ceased (cf. can. 701 and can. 692). But this is not the case with someone who is illegitimately

vitae et professionis religiosae. In utroque autem casu Supremus Legislator institutum vocat ad servandam “aequitatem et evangelicam caritatem [...] erga sodalem, qui ab eo separatur” (cf. can. 702, §2).

Enimvero haec Legislatoris adhortatio, immo praescriptio, quae obligationem instituto imponit, ast non ius sodali ab eo separati adsignat, quod iudicialiter vindicare valeat, ansam praebet argumentando “a fortiori” pro non minore exercitio “aequitatis et evangelicae caritatis” erga sodalem, qui partim solum et nonnisi ad tempus, non autem radicitus nec definitive, ab instituto separetur, qui est exclaustratus. Quod autem religioso ab instituti domo illegitime absenti minime prodest. Nam haud secus ac exclaustratus ii quibus indultum ab instituto discedendi concessum sit, item ab instituto dimissi, ad normam iuris seu legitime extra instituti domum degunt; immo definitive separati necessario omnino extra instituti domo commorantur nec redire valent, cum eorum “vota necnon iura et obligationes ex professione promanantia” prorsus cessaverint (cf. can. 701 et can. 692). Non ita qui illegitime a domo abest suam violans in domo instituti habitandi obligationem ex religiosa professione in instituto promanantem, quae necessario et violationem officii oboedientiae secumfert.

absent from the home in violation of his or her obligation to live in the home of the institute flowing from the religious profession in the institute, which necessarily carries with it also a violation of the duty of obedience.

16. Exclaustration granted through an indult is a favour, namely a free concession by the authority, to which the subject has no right. Unless otherwise determined by law or evident by the very nature of the matter, it is governed by the norms on singular administrative acts and indeed concerning rescripts and it can be revoked by the authority which had granted it (cf. cann. 47 and 59, §§1-2, and can. 75 compared with can. 79).

Finally, it would be difficult to understand the concept of an illegitimate, much less of an invalid, revocation of the exclaustration granted as a favour by the Apostolic See. Certainly, once the favour of exclaustration is revoked, which might have been granted before being healed of the illness, a religious could seek permission mentioned in canon 665, §1, and if this is denied, he or she could always place an administrative recourse. But when the exclaustration might not have been granted as a favour but was imposed by the Holy See, according to the norm of canon 686, §2, its revocation would be clearly a most favourable act, which restored anew to the religious the full exercise of his or her rights.

16. Exclaustratio per indultum est gratia, libera nempe ab auctoritate concessio ad quam subiectum nullo ius habeat. Nisi aliud iure statuitur vel ex rei natura evidens sit, ipsa regitur normis de actibus administrativis singularibus et quidem de rescriptis et potest ab auctoritate, quae eam concesserit, revocari (cf. cann. 47 et 59 §§ 1-2 et 75 coll. cum can. 79).

Haud denique intellegi posset mentis conceptum illegitimae eo vel minus invalidae revocationis exclaustrationis in gratiam a Sede Apostolica concessae. Profecto revocata gratia exclaustrationis, quae causa infirmitatis curandae sit antea concessa, religiosus petere poterit licentiam, de qua in can. 665, §1, quodsi negata sit, recurrere in via administrativa semper poterit. Ast cum exclaustratio non in gratiam concessa sit verum a Sancta Sede, ad normam can. 686, §2, imposita, eius revocatio plane actus erit maxime favorabilis, qui religioso denuo plenum suorum iurium exercitium restituit, ita ut vix vel ne vix quidem intellegi possit religiosum adversus eiusmodi actum recurrere, cum recursus haud secus

Consequently, one can hardly understand that a religious is placing a recourse against such an act, because a recourse, unlike an appeal, could be allowed only against an act by which the subject might have suffered harm.

Finally, the consent of a religious is clearly not required for the revocation of exclaustation. Imposed exclaustation is something odious, in fact most odious, which suspends certain very important rights inherent to his or her profession and incorporation; therefore, as we have said, the revocation of the act is very favourable, and it allows the person to reassume full exercise of his or her rights and to lead again a life fully in conformity with the state of religious life, which he or she had chosen. And because we are dealing with an exclaustation granted as a favour, a favour is gratuitously and freely given; it is granted benevolently by a competent authority; and therefore its revocation does not violate any right acquired by the religious. Moreover, should the religious so choose, there is nothing withholding him or her from petitioning again the concession of such a favour.

ac appellatio nonnisi adversus actum quo subiectum gravetur dari valeat.

Plane denique numquam requiri religiosi consensus ad exclaustationis revocationem. Exclaustatio imposita quid odiosum est, immo odiosissimum, quod religiosi suspendit quaedam magni momenti iura eius professioni et incorporationi in instituto inhaerentia, qua re, ut dictum est, revocatio actus est quammaxime favorabilis, qui ei permittit plenum iurium suorum exercitium readsumere et vitam iterum ducere plene convenientem vitae statum, quem elegerit, religiosum. Et cum de exclaustatione in gratiam concessa agitur, gratia est gratis data libere a competenti auctoritate benigne concessa, qua re eius revocatio nullum laedit ius religioso acquisitum. Ceterum nil obstat quominus religiosus, si velit, iterum eiusmodi gratiae concessionem deinde petat.

3 — *The Argument*

17. The acts contain several documents together with testimonies to prove the illness of the petitioner, that is, more accurately, to prove that the

petitioner, due to her illness, was incapable of living common life in a house of the Institute for several years, and still is. But this is not relevant to the matter nor is it of any interest to us. We are not asked the question whether humanity or charity require that the permission be granted to the petitioner to live outside the house of the institute “for the treatment of illness.” In fact, according to the norm of law, as we saw above, such a petition is not to be presented to Our Apostolic Tribunal but to the major Superior of the petitioner, who, with the consent of her council, may be able to grant the requested permission without any limitation of time and in fact as long as the necessity lasts; in case of its rejection, should that happen, recourse to the Apostolic See is open, and in fact to the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life, and finally perhaps to the Supreme Tribunal of the Apostolic Signatura itself.

Here we are dealing rather with monetary dues or obligations, if there are any, for example, “*whether and how much must be paid to the petitioner by the Institute.*” We do not understand by what title money could be paid to the petitioner by the Institute. In fact, the petitioner is a member of the very Institute, that is, she is incorporated into it with all the rights and duties arising from her profession of perpetual vows. But she is not some other active economic subject contra-distinguished from the Institute. In fact, according to the norm of law, whatever is owed to the petitioner by reason of work or aid belongs in its entirety to the same Institute to which she is ascribed, by the very fact of its acquisition. Therefore, it is beyond one’s comprehension how the Institute is obliged to pay to the petitioner as if she were extraneous to the Institute. Certainly, if the petitioner were to live common life in the house of the Institute, the Institute must fulfill all its obligations toward her through its Superiors, that is to say, provide her everything that is necessary to attain the end of her vocation in the Institute according to the norm of its constitutions, but above all to support her and to provide for all her needs pertaining to her mental and physical health. The same is true if, in order to receive treatment for her ill health, after having petitioned and obtained the permission according to the norm of law, the petitioner were to reside out the house of the Institute. The petitioner certainly has the right to petition for such a permission so that the competent Superior (together with her council) may in fact weigh the matter with kindness and christian and fraternal charity and decide and respond to her. Should the petitioner think that the Insitute is failing to provide her, through the competent Superior, everything to which she has the right, whether she is living in the house of the Institute or living legitimately elsewhere with permission, she certainly will have the right to proceed by way of administrative

recourse, and finally perhaps even by way of contentious-administrative recourse; likewise, should she think that she is harmed by the denial of the permission she might have sought. But, in the case, as is derived from the acts, the contrary having not been proven by the petitioner's defence, the petitioner abandoned common life in the house of the Institute and did not even present a petition for permission to live outside the house of the Institute. In fact, it is absolutely beyond comprehension by what title she can vindicate her right to the money to be paid by the Institute.

18. The foundation and reasoning of the appealed Rotal sentence seems to lie particularly in the fact that it considered the revocation of exclaustation decreed by the Decastery null, because "the consent given by the Sister *while under treatment* to revoke the exclaustation has no juridic efficacy" (n. 16). Therefore, the petitioner would really still enjoy the indult of exclaustation and would have the same right to the "canonical pension," which, the sentence says, was once allocated to her and consistently raised according to the change in circumstances and to have it raised again. Nevertheless, as we explained above, the consent of a religious member is not at all required for valid revocation of exclaustation.

In order to prove that the Institute itself is aware of the incapacity of the petitioner to give valid consent to the revocation of exclaustation, therefore exclaustation has not been validly revoked and it continues to be in force, the appealed sentence alleges that the Institute "had not commenced" the "procedure" for dismissal of the petitioner from the Institute. But the validity or not of an act of a competent Dicastery of the Roman Curia certainly does not depend on an opinion, which this or that institute may or may not have about a matter. Nor can one conclude that by the very fact the Institute had not taken any step for dismissing the petitioner, the Institute could not do so without the exclaustation being invalidly revoked. A long illegitimate absence from the house is indeed counted among the grave causes because of which a religious can be dismissed (cf. can. 696, §1), but not among the very few and the gravest of all causes because of which a member must be considered *ipso facto* dismissed according to the norm of *CIC* promulgated in 1983 (cf. can. 694, §1, 1°-2°), or must be dismissed (cf. can. 695). Nor can one think that the obligation of a religious to live in the house of an Institute can be prescribed and has been really prescribed due to "inaction" of the Institute, which might have failed to dismiss her.

In fact, the psychic illness of the petitioner, as long as it exists, could be an obstacle to her dismissal, not in accord with canon 689, §3, which deals with some other person—namely about not dismissing someone whose time of profession has been completed and yet, because he or she has become

insane, cannot be admitted to a new profession—but under the aspect of imputability, which is required by law for a religious to be dismissed because of illegitimate absence (cf. can. 696, §1). Thus it might have been more probable that the Institute did not try to dismiss the petitioner because of the already foreseen defence argument that the petitioner's violation of the obligation to live in the house of the Institute is not sufficiently imputable, and indeed due to psychic illness, with which she was suffering.

Anyway, it is not necessary nor is it right to attribute to the Institute at the outset bad intention of dismissing the petitioner and then try to explain why such a decision had not been executed yet. More correctly, one must presume that the Institute has no desire to dismiss the petitioner but rather to care for her, in a manner proper to her religious state, and in fact either by receiving her into the home and by treating her there or by responding to her petition for appropriate permission; furthermore the acts show that the Institute had repeatedly and clearly declared and still declares this through the Superior.

19. But earlier for several years the petitioner's condition of life was that of exclaustation. Therefore, particularly in view of her illness, it was considered right and just that the Institute offers her the financial help, with which she could directly look after her needs. There was in fact some semblance of separation which might both juridically explain and practically demand this. However, the judicial or administrative authority might have determined that a defined sum of money was to be given daily or monthly to the petitioner solely for the purpose of sustenance and treatment during [the time of her exclaustation]. But it was not some kind of "salary" or monetary due to be paid to the petitioner, which could not have been done. After the passage of time, with the revocation of exclaustation, it is not possible to think that the Institute is in debt to and a debtor of the petitioner. If the determined sums of money had not been sent over to the petitioner at stipulated times or at least not given in its entirety, so that now accumulated, and perhaps even "with interest," and so on, it must be paid now to the petitioner by the Institute. And—we may now argue through reduction to the absurd—even if this were done, it would be of no relevance since such sums paid to the petitioner would have been accrued only to the Institute.

20. Nor can one argue that the aging petitioner, because she illegitimately resides outside the house of the institute, is very sick and is in a very pitiable condition, without anyone being concerned about her urgent needs and caring for her, and therefore, the Institute must give to the petitioner the sum of money out of kindness and Christian and fraternal charity. Certainly if it is proven to the Institute that this is the condition of the petitioner, it could

decide on its own accord that such a charitable subsidy must be offered to the petitioner, despite her illegitimate absence. Anyway, a tribunal can in no way decide that the Institute must pay the sum of money to the petitioner living illegitimately outside the house of the Institute, that is to say, that the petitioner residing outside the house of the Institute without permission has the right to the sum of money to be paid by the Institute. And this might be even more clearly understood if the contrary is considered, that is, through reduction to the absurd, as they say. In fact, if we were to decide in favour of the petitioner's thesis, by that very fact this Apostolic Tribunal would be decreeing that any member of a religious Institute can illegitimately, without any permission, abandon common life in the house of his or her institute, and claim living allowance to be paid to him or her by the Institute, as long as he or she attempts to prove to the tribunal that he or she is in a state of need; and because religious are generally members of institutes of pontifical right, most will approach the Roman Rota, which has otherwise already acknowledged such a right!

21. Following closely the points made in the above mentioned decree of the *Turnus* of 10 March 2006 (B. Bis 24/06) and moved by kindness and priestly and paternal at the same time fraternal charity, We earnestly invite the petitioning Sister "to abide by the duties of her personal status according to the mind of the letter of [...] the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life of 15 June 2001, in which also the faculty of the Superior was nobly outlined 'to authorize the absence from the community for an infirm religious in case it is going to be advantageous for the well being of the religious and of the community'" (n. 13); and once the permission is requested and granted, the rights of the Sister to all kinds of help, assistance and support foreseen by law to be granted to her by the Institute fully revive, as if the Sister were living in a house of the Institute using her rights and observing her obligations flowing from her profession.

22. After having carefully weighed everything said both in law and in fact, We the undersigned Prelates Auditors of the *Turnus*, sitting for the Tribunal, and having only God before our eyes, having invoked the name of Christ, decide, declare and definitively sentence responding to the doubt:

NEGATIVELY TO THE FIRST, AFFIRMATIVELY TO THE SECOND, THAT IS, THE ROTAL SENTENCE OF 18 OCTOBER 2011 MUST BE OVERTURNED AND NOTHING IS TO BE PAID TO THE PETITIONER BY THE INSTITUTE, AND *AD MENTEM*; THE *MENS* HOWEVER IS THAT THE PETITIONER AND THE INSTITUTE MUST ALWAYS RESPECT THEIR MUTUAL RIGHTS AND OBLIGATIONS ACCORDING TO THE NORM OF LAW, WITH JUSTICE ALWAYS TEMPERED BY THE SWEETNESS OF MERCY.

We thus decide, mandating the Ordinaries of places and Administrators of Tribunals, to whom it pertains, that they notify this Our definitive Sentence according to the norm of law and in accord with the existing praxis, to those who have interest in it, with respect to all its legal effects.

Given in Rome, at the seat of the Roman Rota, on 20 March 2013.

David-Maria A. JAEGER, *Ponens*

Vitus Angelus TODISCO

Philippus Heredia ESTEBAN

Marcus GRAULICH

David SALVATORI

JURISPRUDENCE II (A)

DENIAL OF THE RIGHT OF DEFENCE (CAN. 1620, 7^o; DC ART. 270, 7^o)

Decree *coram* Yaacoub, 24 October 2012 (Great Britain)¹

In the Year of the Lord 2012, on October 24th, the undersigned Fathers Auditors of the *Turnus*, legitimately convened at the seat of the Tribunal of the Roman Rota to define the pre-judicial question in the above mentioned case, namely of the complaint of nullity against the sentence of 28 January 2010 pronounced by the first instance tribunal, issued this decree.

1 — *The Facts*

1. Catherine O'Brien, a Catholic, the woman petitioner, born on 14 June 1946, met in 1980 Robert Dole, the man respondent, a member of the Anglican Church.

The parties contracted canonical marriage on 16 January 1982 in the Catholic Church situated within the confines of the Archdiocese of Westminster. Although a son was born on 2 October 1985, the woman left the man and on 29 May 1987 obtained the civil divorce.

2. Then in 1987, the woman presented a *libellus* to the first instance ecclesiastical tribunal in order to seek a declaration of nullity of her marriage due to defect of discretion of judgement concerning the essential matrimonial rights and duties to be mutually given and accepted on the part of both parties according to canon 1905, 2^o. After hearing the parties and five

¹ Decree *c.* Yaacoub, 24 October 2012 (Great Britain); Prot. No. 21.453. English trans. by Rev. Augustine Mendonça, JCD. Translated and published with permission of the Dean of the Roman Rota.

witnesses and because of fear of the proofs being subpoenaed by the civil court for civil proceedings, the cause of nullity was suspended, and it was reopened on 27 August 2007. In fact, a Judicial College was constituted on 28 August 2007, and the *libellus* was admitted on 31 August 2007. The doubt was determined on 5 September 2007 according to the formula: “Whether there is proof of nullity of marriage in the case due to defect of discretion of judgement concerning the essential matrimonial rights and duties to be mutually given and accepted on the part of both parties according to the norm of canon 1095, 2º.”

Then on 29 June 2009 the decree of publication of the acts was issued and on 18 July 2009 the decree of conclusion of the cause was pronounced. After the advocates of both parties presented their briefs, the defender of the bond presented his observations.

Then on 28 January 2010, the tribunal pronounced a negative sentence in favour of the bond in the first grade of trial, that is, “There is no proof of nullity of marriage in the case on the ground of grave defect of discretion of judgement concerning the essential matrimonial rights and duties to be mutually given and accepted on the part of both parties.”

3. After the publication of the sentence, the woman petitioner interposed an appeal together with a plaint of nullity before this Apostolic Tribunal against the first instance sentence, because she stated that she was not able to inspect the Observations of the defender of the bond nor to respond to them, nor did she receive notice of response from the Supreme Tribunal of the Apostolic Signatura, and the copy of the sentence for the bond was given to her only after a second request. The copy of the sentence, however, lacked the names of the Judges and of the defender of the bond, nor did it explain how the appeal could be interposed.

4. The Rotal *Turnus* was constituted by the decree of the Dean dated 24 October 2011. By his decree of 18 January 2012, the *Ponens* determined: “The incidental question of the nullity of the sentence will be dealt with through written Memoranda.”

By his decree of 9 February 2012, the Dean appointed *ex officio* advocates for the parties only for the incidental case. The Summary, an Addendum to the Summary, the Memorandum for the petitioner and the Memorandum for the respondent were distributed.

After obtaining the Memoranda of the *ex officio* advocates of the parties as well the *votum* of the Promoter of Justice and that of the Defender of the Bond, the above mentioned question is proposed to us today for a response.

2 — The Law

5. It is necessary to note here that the nullity of a juridic act, and in particular of a judicial decision which is a sentence, is considered something odious; in any case, the canons on the matter must be subjected to strict interpretation.

Among the reasons for irremediable nullity is the denial of the right of defence. For, in canon 1620, 7° it is expressly stated: “A sentence suffers from the defect of irremediable nullity if: [...] the right of defence was denied to one or the other party.”

6. The denial of the right of defence occurs if the judge explicitly or implicitly denies or obstructs to the party the exercise of such a right, not if the party fails to exercise this right because of negligence or renunciation.

The right of defence taken in a general sense comprises two elements singly: the right to information and the right to a hearing.

7. The right of defence demands that the parties are able to defend themselves through the exercise of the *contradictorium*. From a formal perspective, the *contradictorium* begins through the joinder of the issue (cfr. can. 1513), by which the object of contention is legitimately defined in its elements, and completed by the faculty to adduce proofs given to and protected for both parties (the judicial examination of the parties and of the witnesses that were introduced, presentation of documents, etc.).

2 — In iure

5. Heic oportet animadvertere nullitatem alicuius actus iuridici, atque in specie decisionis iudicialis quae est sententia, aliquid odiosum haberi; utcumque, in re, canones strictae interpretationi subici debent.

Inter motiva insanabilis nullitatis adest denegatio iuris defensionis. Nam in can. 1620, n. 7 expresse statuitur: “Sententia vitio insanabilis nullitatis laborat, si [...] ius defensionis alterutri parti denegatum fuit.”

6. Denegatio iuris defensionis habetur si Iudex explicite vel implicate parti exercitium huiusmodi iuris denegat vel praepedit, non si ipsa pars ex neglegentia vel renuntiatione, hoc ius non exercet.

Ius defensionis generaliter sump-tum duo elementa singillatim complectitur: ius ad informationem et ius ad auditionem.

7. Ius defensionis exigit ut partes per exercitium contradictorii sese defendere possint. Contradictorium ex perspectu formali incipit per litis contestationem (cfr. can. 1513), qua obiectum litis in suis elementis legitime definitur, et perficitur facultate adducendi probationes utrique parti data et servata (iudiciale examen partium ac testium inductorum, exhibitio documentorum, etc.).

Moreover, the right of defence demands that the parties are able to inspect all the acts in order to prepare proper defence. If in fact the proofs adduced by the opposing party are unknown, it becomes absolutely impossible to contradict them and to defend one's right.

8. In his allocution to the Roman Rota of 26 January 1989, Blessed John Paul II teaches us as follows with regard to the right of defence: "One cannot conceive of a just judgment without the contention (*contradictorium*), that is, without the concrete possibility granted to each party in the case to be heard and to be able to know and contradict the requests, proofs, and deductions adopted by the opposing party or '*ex officio*'. The right of defence of each party in the trial [...] should obviously be exercised according to the just dispositions of positive law. It is not the function of positive law to deprive one of the exercise of the right of defence, but to regulate it so that it does not degenerate into abuse or obstructionism, and at the same time to guarantee the practical possibility of exercising it. The faithful observance of the positive law in this regard constitutes therefore a grave obligation for those engaged in the administration of justice in the Church" (John Paul II, Allocution to the Roman Rota, 26 January 1989, in *AAS*, 81 [1989], p. 923, n. 3).

Praeterea ius defensionis postulat ut partes omnia acta inspicere possint ad propriam defensionem apte parandam. Si enim probationes a parte adversa adductae ignorantur, impossibile prorsus evadit illis contradicere et proprium ius defendere.

8. In Allocutione ad Rotam Romanam diei 26 ianuarii 1989 Beatus Ioannes Paulus II de iure defensionis nos edocet: "Non si può concepire un giudizio equo senza il contraddittorio, cioè senza la concreta possibilità concessa a ciascuna parte di essere ascoltata e di potere conoscere e contraddire le richieste, le prove e le deduzioni addotte dalla parte avversa o '*ex officio*'. Il diritto alla difesa di ciascuna parte del giudizio [...], deve ovviamente essere esercitato secondo le giuste disposizioni della legge positiva, il cui compito è, non di togliere l'esercizio del diritto alla difesa, ma di regolarlo in modo che non possa degenerare in abuso od ostruzionismo e di garantire nello stesso tempo la concreta possibilità di esercitarlo. La fedele osservanza della normativa positiva al riguardo costuisce, perciò, un grave obbligo per gli operatori della giustizia nella Chiesa" (Ioannes Paulus II, Allocutio ad Romanam Rotam, 26 ianuarii 1989, in *AAS*, 81 [1989], p. 923, n. 3).

3 — *The Argument*

9. On the 2nd of September, the woman petitioner proposed in writing a complaint of nullity against the sentence on several grounds: a) “The nature of the alleged grounds was not explained to me...”; b) “The respondent had been not closely questioned about his understanding of the permanence of the marriage”; c) “The names of the judges and that of the Defender of the Bond were not made known to me”; d) “My witnesses and those of the respondent were interviewed prior to their names being disclosed to the other party; therefore we were denied the opportunity to raise any objections to them”; e) “The respondent’s constant interference and threats of civil litigation were allowed to prolong the instruction phase”; f) “My witnesses, some of whom are medically qualified, were unaware that their professional opinions regarding my state of mind ... were admissible”; g) “The importance of reviewing the accrued evidence at the publication phase was not explained to me; consequently, I did not give it the attention that it deserved”; h) “I was not given any opportunity to see or respond to the observations of the Defender of the Bond”; i) “I was not informed of the response from the Apostolic Signatura”; j) “The judgment does not contain information as to how one might lodge an appeal” (Summariolum, pp. 77-80).

The motives of nullity of the sentence can be reduced to the denial to the petitioner of the right of defense.

10. However, the arguments adduced by the woman petitioner are not sufficient to declare the irremediable nullity of the sentence of the first grade, because: a) the right to information was protected and therefore, the woman petitioner was informed of the different phases of the process (cfr. Summary: the decrees constituting the Tribunal dated 28 August 2007 and of the admission of the *libellus* dated 31 August 2007 at p. 3, the decree of the concordance of the doubt dated 5 September 2007, at p. 4, the decree of the admission of proofs dated 5 September 2007 at p. 5, the decree of publication of the acts dated 19 January 2009 at p. 50, the second decree of publication of the acts dated 29 June 2009 at p. 55, the decree of conclusion of the cause dated 18 July 2009, at p. 58); b) the right to hearing was safeguarded, therefore the woman petitioner was heard twice (cfr. Summary, pp. 6-16, 52-54); after the publication of the acts she was able to inspect the acts and to present her observations (cfr. Summary, p. 51), during the first grade of trial she had the assistance of an advocate (cfr. Summary at p. 88).

After having carefully weighed everything said in law and in fact, the undersigned Fathers Auditors of the *Turnus*, keeping in mind the written briefs of both of the *ex officio* advocates and of the Promoter of Justice and

the Defender of the Bond, decided to respond to the proposed question, as they respond:

NEGATIVELY, THAT IS, THERE IS NO PROOF IN THE CASE OF IRREDEMIABLE NULLITY OF THE SENTENCE PRONOUNCED BY THE TRIBUNAL OF THE FIRST GRADE ON 28 JANUARY 2010.

This decree shall be notified to all who have interest in the case with respect to all its legal effects.

Given in Rome, at the seat of the Tribunal of the Roman Rota, 24 October 2012.

Abdou YAACOU, *Ponens*
M. Xaverius Leo AROKIJARAJ
Alexander Arellano CEDILLO

JURISPRUDENCE II (B)

1. THE JURIDIC IMPACT OF THE FAILURE TO COMMUNICATE THE OBSERVATIONS OF THE DEFENDER OF THE BOND TO THE PARTIES (CAN. 1603; DC ART. 242)

2. THE JURIDIC RELEVANCE OF NON-ACQUISITION OF AN EXPERT REPORT (CANN. 1579, 1680; DC ARTT. 203, 212).

Decree *coram* Erlebach, 9 April 2013 (Great Britain)¹

In the year of the Lord 2013, on April 9th, the undersigned Fathers Auditors of the *Turnus*, legitimately convened at the seat of the Tribunal of the Roman Rota to define the proposed question: *Whether or not the Rotal decree coram Yaacoub issued on 24 October 2012 should be confirmed, that is, whether there is proof of nullity of the sentence pronounced in the first grade of trial in the cause mentioned above*, issued this decree.

1. *The Facts*

1. Already in 1987, Catherine O'Brien approached the first instance ecclesiastical tribunal to declare null her marriage contracted with Robert Dole on 16 January 1982. Because of fear of the proofs being subpoenaed for the civil process, the canonical marriage nullity process was put on hold. It was only because of the petition of the woman dated 27 August 2007, the cause of nullity of marriage was resumed. The object of the trial was determined around the defect of discretion of judgement. Both parties had their own advocates.

¹ Decree *c. Erlebach*, 9 April 2013 (Great Britain); Prot. No. 21.857. English trans. by Rev. Augustine Mendonça, JCD. Translated and published with permission of the Dean of the Roman Rota.

The woman was interviewed twice and the means of proofs were acquired and the publication of the acts was done twice. Both the defender of the bond and the advocate of each party presented their respective defences. Then the tribunal of the first grade pronounced a definitive decision on 28 January 2010 in favour of the bond on the part of both parties. The woman however appealed to the Roman Rota together with a plaint of nullity against the above mentioned sentence.

After the judicial college was constituted and *ex officio* advocates for both parties were assigned, the proposed plaint of nullity was discussed through written briefs. On 24 October 2012, the *Turnus coram* Yaacoub decreed that there was no proof of nullity of the sentence of the first grade of trial. The advocate of the petitioner did not stop there and interposed an appeal against the said decree.

The cause was transmitted to the following *Turnus*, that is, Our *Turnus*, and after giving everyone intervening in the cause the faculty to present their own written brief, without excluding the promoter of justice, who however did not write, it is Our task today to respond to the following question: *Whether or not the Rotal decree coram Yaacoub issued on 24 October 2012 should be confirmed, that is, whether there is proof of nullity of the sentence pronounced in the first grade of trial in the cause mentioned above.*

2. *The object of the question:* The petitioner instituted the plaint of nullity against the sentence of the first grade of trial for several reasons with respect to the denial to her of the right of defence. In the above mentioned decree *coram* Yaacoub, it was correctly said: “The motives of nullity of the sentence can be reduced to the denial to the petitioner of the right of defence” (n. 9). The preceding Rotal *Turnus*, following the principle that “the right of defence taken in a generic sense comprises two elements singly: the right to information and the right to a hearing” (n. 6), showed that both were not only granted to the woman petitioner in the first grade of trial, but also she had *de facto* exercised them. For this reason, the *Turnus* came to the conclusion that there was no proof of nullity of the challenged sentence.

The woman petitioner’s advocate interposed an appeal on only two grounds, namely due to defect of communication of the observations of the defender of the bond to the woman petitioner and due to failure to seek an expert report.

In view of the fact that there is no proof with respect to other motives of nullity proposed *ex officio* or to be proposed, the object of the present plaint of nullity is reduced to the above motives of appeal against the decree *coram* Yaacoub of 24 October 2012.

A) Failure to communicate the observations of the defender of the bond

2 — The Law

3. The exchange of defences between the parties and the defender of the bond should be done so that the private and public parties might be able to present their responses (cfr. can. 1603, §1). In this way the *contradictorium* around which the contentious process is organized, must be substantially used also in causes of nullity of marriage. John Paul II admonished about this matter in his allocution to the Roman Rota on 26 January 1989: "One cannot conceive of a just judgment without the contention (*contradictorium*), that is, without the concrete possibility granted to each party in the case to be heard and to be able to know and contradict the requests, proofs, and deductions adopted by the opposing party or *ex officio*" (John Paul II, Allocution to the Roman Rota, 26 January 1989, in AAS, 81 [1989], p. 923, n. 3). But everyone can see that the Legislator has not determined the nullity of a sentence because of failure in exchanging defences.

4. In view of the fact that the exchange of defences is the presupposition of the further defence foreseen by law (cfr. can. 1603), the lack of the above said exchange can be legitimately seen under the light of the denied right of defence. And canon 1620, 7° really determines the

2 — *In iure*

3. *Commutatio defensionum* inter partes et *vinculi defensorem* fieri debet ita ut partes privatae et publicae responsiones exhibere possint (cfr. can. 1603, §1). Hoc modo plenum fit *contradictorium* super quo exstruitur processus contentiosus, substantialiter adhibendus etiam in causis nullitatis matrimonii. Ioannes Paulus II admonuit ad rem sua in Allocutione ad Rotam Romanam diei 26 ianuarii 1989: "Non si può concepire un giudizio equo senza il contraddittorio, cioè senza la concreta possibilità concessa a ciascuna parte nella causa di essere ascoltata e di poter conoscere e contraddire le richieste, le prove e le deduzioni addotte dalla parte avversa o 'ex officio'" (Ioannes Paulus II, Allocutio ad Romanam Rotam, 26 ianuarii 1989, in AAS, 81 [1989], p. 923, n. 3). Ast nemo est qui non videat Legislatorem haud statuuisse nullitatem sententiae ratione defectus *commutationis defensionum*.

4. Attento tamen quod *commutatio defensionum* est praesuppositum praevisae a lege ulterioris defensionis (cf. can. 1603), defectus prae-fatae *commutationis* legitime perspicui potest sub luce denegati iuris defensionis. Et can. 1620, n. 7, statuit revera nullitatem sententiae si

nullity of the sentence if “the right of defence was denied to one or the other party.”

Without prejudice to the principle that the right of defence always remains integral (cfr. can. 1598, §1), the matter must be examined more closely within the context of nullity, because in accord with the norm of canon 1620, 7°, the nullity of a sentence does not result in case of any violation of the right of defence, but only in case of total or even of partial denial, if “the very essence of the trial is lacking” (sent. c. Brennan, 27 November 1958, in *RRT Dec.*, 50 [1958], p. 661, n. 3). The question therefore concerns the essential dimension of the right of defence.

It is peacefully admitted that under the general aspect “one is certainly regarded as being deprived of the substantial right of defence who was neither able to contradict the action brought to trial by the adverse party due to the behaviour of the tribunal itself, nor to challenge the proofs gathered during the instruction, nor to make personal judicial declaration, nor to present arguments with respect to the fact around which the trial was instituted” (interl. sent. c. Stankiewicz, 22 November 1984, in *Monitor ecclesiasticus*, 113 [1988], p. 322, n. 5). Equally valid is the principle stated in a decree coram Colagiovanni of 21 May 1985: “When in fact the right of defence has been denied, that is, because of

“ius defensionis alterutri parti denegatum fuit.”

Firmo manente principio de integro semper manente iure defensionis (cf. can. 1598, §1), in ambitu querelae nullitatis res est tamen pressius videnda, quia ad normam can. 1620, n. 7, nullitas sententiae non scatet in casu cuiuslibet violationis iuris defensionis, sed solummodo in casu denegationis totalis vel etiam partialis, si “essentia ipsa iudicii deficiat” (sent. c. Brennan, diei 27 novembris 1958, in *RRT Dec.*, 50 [1958], p. 661, n. 3). Quaestio est ergo de dimensione essentiali iuris defensionis.

Pacificum est quod sub adspectu generali “substantiali iure defensionis is certo spoliatus habetur, qui nec actioni a parte adversa in iudicium deductae contradicere valuit ob agendi rationem ipsius Tribunalis, nec probationes tempore instructionis collectas impugnare, nec propriam declarationem iudiciale facere, nec argumenta exhibere quoad factum circa quod iudicium versabatur” (sent. interl. c. Stankiewicz, diei 22 novembris 1984, in *Monitor ecclesiasticus*, 113 [1988], p. 322, n. 5). Pariter valet principium statutum in decr. coram Colagiovanni diei 21 maii 1985: “Quando reapse ius defensionis denegatum fuerit, seu ob quas omissiones seu violationes, iam deducitur ex ipsa

the omissions or violations, it is already deduced from the very nature of the process which is constituted through the principle of contradictorium, with the concession of the faculty not only to know the alleged grounds, but also the proofs adduced with the possibility therefore of responding and deducing contrary proofs" (decr. c. Colagiovanni, 21 May 1985, in RRT Decr., 3 [1985], p. 121, n. 8). Therefore, because the presentation not only of the proofs, but also of the arguments, pertains to the essence of the right of defence, one can admit that the discussion phase of the process is of the essence of a contentious trial.

However, not all and every faculty which belong to the parties in the discussion phase have the same value. The faculty to explain one's deductions in law and in fact and to contradict the proofs presented by the other party, namely the faculty to present the first defence, that is, the written brief of law and of fact (by the party or rather by his or her advocate) and the observations (on the part of the defender of the bond), pertains to the crux of the discussion phase.

The second defence, that is, written brief of response or responses on the part of the defender of the bond pertains only to the integrity of the discussion phase. We are taught on this matter in conformity with this principle in an interlocutory sentence coram

natura processus qui constituitur per contradictorii principium, cum facultate facta cognoscendi non solum capita alligata, sed etiam probationes adductas cum possibilitate ideo respondendi et deducendi probationes contrarias" (decr. c. Colagiovanni, diei 21 maii 1985, in RRT Decr., 3 [1985], p. 121, n. 8). Cum ergo non solum exhibitio probationum, sed etiam argumentorum, pertineat ad essentiam iuris defensionis, admitti potest quod phasis discussoria processus est ad essentiam iudicii contentiosi.

Non omnes tamen et singulae facultates quae spectant ad partes in phasi discussoria eadem vi pollent. Ad medullam phasis discussoriae pertinet facultas proprias pandendi deductiones in iure et in facto atque contradicendi probationibus ab altera parte exhibitis, scilicet facultas exhibendi primam defensionem seu Restrictum iuris et facti (a parte vel potius a suo defensore) et Animadversiones (ex parte vinculi Defensoris).

Secunda defensio, seu Restrictus responsionis vel Responsiones ex parte vinculi Defensoris, pertinet solummodo ad integritatem phasis discussoriae. Congruenter cum hoc principio docemur ad rem in sententia interlocutoria coram Pinto diei

Pinto of 13 January 1984: “it does not seem that the sentence is invalid when the violation of the right of defence is limited to the defect of communication of the observations of the defender of the bond” (interl. sent. c. Pinto, 13 January 1984, in *Monitor ecclesiasticus*, 110 [1985], p. 287, n. 8).

13 ianuarii 1984: “non videtur invalidam esse sententiam cum iuris defensionis violatio limitatur ad defectum communicationis animadversionum defensoris vinculi” (sent. interl. c. Pinto, 13 January 1984, in *Monitor ecclesiasticus*, 110 [1985], p. 287, n. 8).

3 — *The Argument*

5. In her plaint of nullity against the sentence pronounced in the first grade of jurisdiction, the petitioner complained, among other things: “I was not given any opportunity to see or to respond to the observations of the Defender of the Bond.” Because the decree issued by the preceding Rotal *Turnus* on 24 October 2012 did not explicitly say anything about this reason of the invoked plaint of nullity, the Rotal advocate of the woman petitioner interposed an appeal against the said decree, arguing that the “[absence] of communication of the observations of the defender of the bond impeded [the woman petitioner] from preparing the written brief of response.”

But, in his memorandum the advocate of the petitioner, although he has presented extensive jurisprudence on the importance of the discussion phase for the right of defence, hardly proves the juridic foundation of his petition. He argues among other things: “it is of great importance to note that it is reported in the jurisprudence of the Supreme Tribunal of the Apostolic Signatura (cfr. *Monitor ecclesiasticus*, 113 [1988], pp. 273-274): ‘In the concrete the right of defence, that is, the judicial *contradictorium* consists particularly: a) in the faculty to introduce proofs during the trial; b) in the faculty to know the proofs adduced by the adverse party; c) in the faculty to present one’s own deductions, allegations and defences; d) in the faculty to respond, at least once, to the allegations and defences of the adverse party. Hence, if the concrete possibility of exercising all the above said faculties is denied, there is indeed no judicial *contradictorium*, therefore the process is null because there lacks in it what essentially constitutes the process. [...], that is, the *contradictorium*’ (emphasis is of the advocate of the petitioning party; cfr. decr. c. Boccafolà, 25 July 1989, in *RRT Decr.*, 7 [1989], p. 143, n. 8). But the argument drawn from the above cited sentence of the Supreme Tribunal of the Apostolic Signatura is not valid, although there is express

mention in it of the “faculty to respond, at least once, to the allegations and defences of the adverse party,” because in the above cited text mention is made of nullity of the sentence in case of total denial of the right of defence, namely “if the concrete possibility of exercising all the above said faculties is denied,” while in our case we are dealing with the denial of only the possibility of responding to the observations of the defender of the bond.

Therefore, we must stand by the above reported principle (under n. 4) and accepted also by the defender of the bond of this Apostolic Tribunal: “a sentence is not invalid when the violation of the right of defence is limited to the failure in communicating the observations of the defender of the bond” (Memorandum D.V., p. 5/8). The failure in communicating or not publishing the observations of the defender of the bond, of which the same respondent complains, is indeed quite probable, but it is evidently a matter of only an accidental violation, not however “a substantial violation of the right of defence,” as the advocate of the respondent party rightly argues” (Memorandum for Respondent Party, p. 6/15).

6. The complaint of the woman petitioner however lacks any foundation whatsoever, as far as the failure of communication to her of the observations of the defender of the bond in view of composing a written brief of response, because the woman had her own advocate, who moreover wrote the defence brief of law and of fact. Therefore, the right and duty to present, if and to the extent, the written brief of response, pertained to the advocate. Even he, with the knowledge both of law and of the praxis of the tribunal of the first grade of trial, could have had access to the observations of the defender of the bond or could have asked for them. If he did not do this, the nullity of the sentence certainly does not flow from such negligence—if it is a matter entirely of negligence.

B) Failure to obtain an expert report

3 — *The Law and the Argument*

7. The Rotal advocate of the woman petitioner, referring himself to the document prepared for the Judge of the State [civil court Judge] and entered into the cause of nullity of marriage, from which some semblance of certain anomaly of a psychological nature is found particularly in the respondent man (cfr. Addition to the Summary; Summ.lum Alt., p. 14), affirms that the tribunal of the first grade of trial should have acquired *ex officio* an expert report in order to investigate the possible cause of a psychological nature

with respect to the alleged ground. The above said advocate added this legal reason: “Indeed, in this kind of causes the assistance of an expert is necessary as prescribed in canon 1680 and much is owed to their experience (can. 1579, §2)” (Summ.lum Alt., p. 14).

Whether or not it is appropriate to invoke canon 1579, §2, the present law does not order the acquisition of an expert report under the penalty of nullity although the assistance of an expert is generally necessary. The defender of the bond of this Apostolic Tribunal explains best: “the necessity of whether or not an expert report must be prepared *ex officio* must be decided by the instructing judge from the circumstances of the cause (cfr. Supreme Tribunal of the Apostolic Signatura, “Responsus ad quaesitum de usu periti in causis nullitatis matrimonii,” in *Periodica*, 87 [1998], p. 621, n. 5). In other words, the necessity of using an expert report in these causes is, therefore, not absolute, rather it depends on the probatory value of other proofs that have been acquired” (Memoriale D.V., p. 6/10).

This motive of nullity, invoked by the illustrious advocate of the woman petitioner, therefore lacks all legal foundation. The question of whether or not to prepare an expert report does not pertain to the sphere of nullity of a sentence. One must look rather under the species of right administration of justice about this matter, hence the defect of expert report can constitute an argument for appeal.

8. After having weighed properly everything said in law and in fact, the undersigned Fathers Auditors of the *Turnus* decided to respond to the question proposed to them as they respond:

AFFIRMATIVELY TO THE FIRST, **NEGATIVELY** TO THE SECOND, THAT IS, THERE IS NO PROOF OF NULLITY OF THE SENTENCE OF THE FIRST GRADE OF TRIAL.

The cause is therefore remitted to the Rotal *Turnus coram* Yaacoub for dealing with the merit of the cause.

And the Fathers decreed that the decree shall be notified to all who have interest in it with respect to all its legal effects.

Given in Rome, at the seat of the Tribunal of the Roman Rota, 9 April 2013.

Gregorius ERLEBACH, *Ponens*
Jair Ferreira PENA
Gerardus MCKAY

JURISPRUDENCE III

CITATION OF PROMOTER OF JUSTICE IN A PROCEDURE FOR DECLARING A DECISION NULL (CAN. 1433; DC ART. 60)

Decree *coram* Erlebach, 15 July 2014 (Germany)¹

The undersigned Fathers Auditors of the *Turnus*, legitimately convened on 15 July 2014 at the seat of this Apostolic Tribunal, in order to define the preliminary question concerning the nullity, or not, of the interlocutory sentence of the appeal tribunal pronounced on 14 November 2013, issued this decree:

Whereas the first instance tribunal had pronounced a sentence on 25 February 2013 by which it declared that there was no proof of nullity of the marriage contracted between Margret Tenderbilt and Heinricus Schlessinger, and the marriage was accused of nullity on grounds of exclusion of the good of the sacrament by the woman petitioner as well as defect of discretion of judgement on the part of the same petitioner;

Whereas at the instance or appeal of the petitioner's advocate the acts of the cause were forwarded to the appeal tribunal, where, after the introduction of a plaint of nullity of the sentence of the first grade of trial—the advocate of the petitioning party in fact maintained that the sentence of the first grade suffered from nullity according to canon 1620, §1 because it was issued by a college of judges, whose president, namely the Judicial Vicar of the first instance tribunal, could not participate in the cause as a judge according to the mind of art. 113, §2 of *DC*, because he had advised the same woman petitioner to introduce the cause (art. 113, §1 *DC*)—the interlocutory sentence was pronounced on 14 November 2013, by which it was declared that there was no proof of nullity of the definitive sentence issued in the first grade of trial;

¹ Decree *c.* Erlebach, 15 July 2014 (Germany); Prot. No. 22.262. English trans. by Rev. Augustine Mendonça, JCD. Translated and published with permission of the Dean of the Roman Rota.

Whereas, because of the appeal of the same advocate of the woman petitioner against the above mentioned interlocutory sentence, the acts of the cause were transmitted to this Apostolic Tribunal;

Whereas, the Defender of the Bond had excepted in his preliminary *votum* a plaint of nullity of the interlocutory sentence of the appeal tribunal because of failure of citation of the Promoter of Justice, and the Promoter of Justice of this Apostolic Tribunal also supported that plaint of nullity;

Whereas, the undersigned *Ponens* admitted the incidentally proposed plaint of nullity of the interlocutory sentence of 14 November 2013, to be dealt with through written briefs;

Whereas, the written briefs on the part of the advocates of each party have already been received, while the Defender of the Bond and the Promoter of Justice have not added anything to the written points proposed by them at the beginning of this instance;

Having taken into consideration that *in terms of law* canon 1433 determines the nullity of the acts and consequently of the sentence based on null acts, in causes “in which the presence of the promoter of justice and defender of the bond is required, if they are not cited [...], unless they actually took part even if not cited, or after they have inspected the acts, at least were able to fulfill their function before the sentence” (cf. art. 60 *DC*), while on the other hand there is no doubt about the necessity of citing the Promoter of Justice in causes, in which the nullity of the judicial sentence is impugned (cf. for motives of law and jurisprudence amply explained in the decree *coram* Stankiewicz, 29 November 1995, in *RRT Decr.*, 13 [1995], pp. 153-155, nn. 5-7);

Having taken into consideration that *in terms of the fact* it is clearly evident from the procedural files of the appeal tribunal that the Promoter of Justice was neither appointed nor cited when the plaint of nullity of the sentence of the first grade of trial was dealt with, nor is there any trace of his actual intervention;

After carefully weighing everything in law and in fact—without excluding the written submissions of the Advocates, Defender of the Bond and Rotal Promoter of Justice —, the undersigned Fathers Auditors of the *Turnus*, decided to respond to the proposed question as they respond:

THERE IS PROOF OF NULLITY OF THE INTERLOCUTORY SENTENCE OF THE APPEAL TRIBUNAL OF 14 NOVEMBER 2013. THE CAUSE IS REMITTED TO THE TRIBUNAL OF THE SECOND GRADE OF TRIAL SO THAT IT MAY CONSIDER CONDUCTING ITSELF IN ACCORD WITH THE NORM OF LAW AND ACCORDING TO THE MIND:

The mind however is: The advocate of the woman petitioner is to see whether (1) he would like to pursue the proposed plaint of nullity so that the

appeal tribunal may judge it anew, after prior intervention of the Promoter of Justice, or (2) would like to insist on the prosecution of the merit of the cause.

In order to follow up on this decision the above mentioned advocate is not to neglect to carefully weigh the following observations of the Rotal Defender of the Bond:

- a) as to the clause “cannot,” mentioned in art. 113, §2 of *DC*, this “has not been set in express words under the sanction of nullity, different from what is done in other places of this Instruction, for example, art. 66, §1—“cannot afterwards validly”; art. 66, §2—“cannot validly”; art. 81, §1—“nor can they be validly”; art. 81, §2—“can be validly shortened”; art. 107, §1—“validly renounce”; art. 136—“cannot be validly changed.”
- b) as to the possible foundation of the plaint under the substantial aspect, “it seems the thesis of the petitioner’s Advocate [...] cannot be sustained because of reasons explained both by the Defender of the Bond of the appeal tribunal [...], and [...] in the interlocutory sentence in the ‘*in iure*’ and the ‘*in facto*’ sections.”

This decree shall be notified to all who have interest in it, with respect of all its legal effects.

Given in Rome, at the seat of the Tribunal of the Roman Rota, on 15 July 2014.

Gregorius ERLEBACH, *Ponens*
Michaël Xaverius Leo AROKIJARAJ
Petrus AMENTA

RECENSIONS — BOOK REVIEWS

Maia LUISI, *Gli istituti misti di vita consacrata: Natura, caratteristiche e potestà di governo*, Ariccia (Rome), Aracne Editor, 2014, 300 p. — ISBN 978-88-548-7376-6 — € 24,00

In this monograph, which constitutes her entire thesis, the author examines in depth the question of the power exercised in institutes of consecrated life, especially “mixed” institutes. The volume is divided into four chapters: 1) the contemporary debate regarding the state of the question; 2) the power in institutes as regulated by the Church up until the promulgation of the Codes; 3) reflections on the clerical, lay and mixed nature of institutes of consecrated life beginning with *CIC* (1983) and since the 1994 Synod of Bishops; and 4) the power exercised in mixed institutes.

While rules may vary from faculty to faculty for a defence, at least regarding publication, it would have lent to an Italian reader’s accessibility if the foreign language citations (Latin, French, Spanish, English and German) had been translated. Especially at the level of the doctorate, any reference made to the Eastern Code as part of the one *Corpus Iuris Canonici* (p. 57) of the Catholic Church is much appreciated and warranted. However, to be honest, a body can really live on one lung rather than breathing fully with two (East and West). And so, when reading doctoral dissertations that focus too narrowly at times on the Latin Code (see pp. 92ff, chapter 3, pp. 209ff), Eastern canonists can sometimes feel like interested observers from another Christian denomination.

In the work’s most important chapter 4, the author’s conclusion that power in mixed institutes is exercised by way of “habitual faculties” is unconvincing. The imprecise premisses leading to that conclusion do not seem to support it (see pp. 257-258). For example, Luisi states: “A non-ordained *christifidelis* can assume an ecclesiastical office according to (*CIC*) canon 145 §1, but cannot obtain offices that require the power of governance, in accord with (*CIC*) canon 274 §1.” In the context of the latter canon on clerics, the reference is to the power of governance in the sense of the power of jurisdiction. Not only can the lay faithful obtain offices and exercise the power of governance in institutes of consecrated life but that power can also

be defined, at least analogously, as ordinary power (cf., however, p. 258). Regarding another conclusion, the author states, “...we arrived at the conclusion that the power exercised by a superior of a religious institute is not, by nature, different from the *potestas iurisdictionis*.” Indeed, the effects of this exercise may be the same as the power of jurisdiction but its nature is not. While all acts of the power of jurisdiction are acts of the power of governance, not all acts of the power of governance are acts of the power of jurisdiction.

The findings of the Commission instituted in 1996 by Pope John Paul II to study the question of mixed institutes have not yet been made public if, in fact, the Commission has arrived at its findings. In the meantime, this work contributes to the ongoing study of these institutes and the rather intricate juridical questions associated with them.

Jobe ABBASS, OFM Conv.

GALLAGHER, Charles, David I. KERTZER, and Alberto MELLONI (eds.), *Pius XI and America*, Proceedings of the Brown University Conference (Providence, October 2010), Christianity and History; Series of the John XXIII Foundation for Religious Studies in Bologna, vol. 11, Zürich, Lit Verlag, 2012, 448 p. — ISBN 978-3-643-90146-0 — US\$ 59.95

Ce bel ouvrage s’inscrit dans le sillage d’un nombre croissant de publications savantes tributaires des archives vaticanes du règne du Pape Pie XI (1922-1939) ouvertes aux chercheurs depuis 2006. Étant donné la période étudiée, il n’y a pas à s’étonner de ce que le propos d’une majorité des communications présentées au colloque de Providence ait été plus ou moins centré sur les positions du Saint-Siège face aux dictatures des années trente, dans un contexte de guerre coloniale (Éthiopie) et de lois raciales. Les événements-clé de l’époque, et ils sont légion, sont replacés dans le cadre général des relations entre le gouvernement américain et l’Église catholique alors confiées aux bons soins de Franklin Delano Roosevelt, à la Maison Blanche, et d’Eugenio Pacelli, à la tête de la diplomatie pontificale.

Les participants au Colloque ont naturellement exploré d’autres facettes d’un règne long et important, mais il subsiste des lacunes. C’est ainsi que les actes n’offrent aucune contribution portant spécifiquement sur le riche héritage canonique de Pie XI.

On notera cependant la présence de quelques textes relatifs à des thématiques para-canoniques, telles la régulation des naissances (*Lucia Pozzi : the*

Problem of Birth Control in the United States under the Papacy of Pius XI ; le Denier de Saint-Pierre (John F. Pollard : *American Catholics and the Financing of the Vatican during the Great Depression : Peter's Pence Payments (1935-1938)*,) et la possibilité d'un recours à des mesures de discipline ecclésiastique visant un prêtre accusé d'extrémisme politique (Gerald P. Fogarty : *The Case of Charles Coughlin : The View from Rome*).

Pierre BELLEMARE

WACHS, Justin M., *Obsequium in the Church: Sacred Tradition, Second Vatican Council, 1983 Code, and Sacred Liturgy*, Gratianus Series, Montréal, Wilson and Lafleur, 2014, xxiv, 256 p. — ISBN 978-2-89689-161-0 — CA\$ 34.95

The word *obsequium* as used in canon law chiefly refers to the response owed by the faithful to the authentic teachings of the pope and bishops. Authors translate it variously with English words that have a range of meanings from “respect” to “submission.” As the subtitle reveals, this book is an analysis of the use of *obsequium* in ecclesiastical sources, especially canon law and liturgical texts. It is a scholarly work with comprehensive references and ample footnotes based on the A.’s doctoral dissertation defended at the Gregorian University in 2013.

The work has four chapters. The first examines the etymology of *obsequium* and definitions of it offered in several Latin dictionaries. On the basis of this analysis, the A. concludes that the word is best translated as “obedience” or “submission.” The second chapter is on the use of the term in the documents of Vatican II and, in particular, in *Lumen gentium* 25. In the third chapter, the A. explains the meanings of *obsequium* in the canons of the Latin and Eastern Codes, especially c. 752 (CCEO c. 599) on the obedience of one’s intellect and will that must be given to teachings of the ordinary, universal magisterium. The fourth chapter is a theological reflection on the use of *obsequium* in contemporary liturgical texts, namely, the *obsequium* given to God which is equivalent to worship.

One issue that this reviewer was pleased to see addressed is the problem inherent in requiring an internal, intellectual obedience to Church doctrines that are not said to be divinely revealed. How can obedience be demanded of the intellect (*obsequium intellectus*) to teachings, not definitively declared, that may not be convincing or understood? If a Catholic, despite all efforts, cannot understand a doctrine or cannot bring himself to agree with it, is it impossible to give the doctrine the required intellectual *obsequium*? The A.

addresses this problem in saying (in my words) that the act of the intellect in this case stems from the person's firm belief in the Church's magisterial authority, and this intellectual conviction and respect for the Church leads the intellect and the will to submit to the teaching. This is an act of humility in that the person "throws off his own will by submitting to and, thus, placing himself under the mission of the superior" (p. 31). Still, this appears to be fundamentally an act of the will rather than the intellect.

An issue that could have been given greater attention is the role of the theologian in furthering the Church's understanding of non-definitive doctrines by raising challenging questions, suggesting new interpretations, etc. The A. excludes the legitimacy of all "dissent" to the teachings of the magisterium, equating it to an act of disobedience, yet the law itself is not so sweeping (cf. c. 1371, 1°). Theologians themselves frequently understand the word "dissent" in a positive way that is comparable to the obligation of scholars to express their views on matters in which they are expert (cf. c. 218). As Ladislav Örsy has observed more than once, this misunderstanding of theologians' motives and goals could more easily be avoided by their using some expression other than "dissent" which, indeed, has the negative, emotionally charged connotation of opposition to the Church's legitimate authority.

John M. HUELS

ALESANDRO, John A., *Indissolubility and the Synod of Bishops — Reflections of a Canon Lawyer*, Mahwah New Jersey, Paulist Press, 2015, ix, 71 p. — ISBN 978-0-8091-4958-2 — US\$ 12.95

Msgr. John A. Alesandro, JCD, JD is a priest of the Diocese of Rockville Centre. A former president of the Canon Law Society of America and recipient of its prestigious Role of Law award (1986), he is also a member of the Catholic Theological Society of America.

Indissolubility and the Synod of Bishops is a short monograph designed to inform and progress the discussion between the Extraordinary Synod of 2014 and the Ordinary Synod of October 2015. One is first cautious when reviewing it after the promulgation of *Mitis Iudex Dominus Iesus* and the publication of the post synodal exhortation, *Amoris laetitia*. Is it not a little like the reader who jumps to the last chapter of a thriller to see how it ends, before returning to pass judgment on the story as it unfolds?

Do not be fooled. While this short text is indeed a "situated utterance" it is also a masterful exposé of the history of the core issue of indissolubility

and sacramentality. Because it so carefully defines the real issues in play, this is a work which will long outlive that inter-synodal period. And because these issues are not yet resolved, even if hints and directions are indicated in the post synodal exhortation, this work remains very relevant.

Alesandro's treatment is in two parts; the first outlining the canonical and sacramental principles framing the discussion while the second part is devoted to suggestions and predictions concerning how canonical procedures might be improved.

In Part One, Alesandro tackles the theological issue about whether marriage as 'restored' by Christ in the scriptures is a restoration of natural marriage or indeed something quite new and distinct. Could a sacramental marriage be something more than just a natural marriage that happens to be between two baptized as the jurisprudence would contend?

The canonical paradigm has long held that faith or its lack affects only the fruitfulness of marriage and not its validity. Noting that this is the paradigm of first premise for both sides in the synodal arguments, Alesandro ponders whether the fact that the essence of this theology of marriage has not been revisited since the 12th century disputes were settled might be a factor stalling theological progress.

He goes on to highlight that contrary to the demonstrably "sparse canonical construct," St John Paul II's teaching shows everything about marriage in the new covenant is greater, elevated and radically new. The further development of his teaching is being held back by the current canonical limitations. The International Theological Commission in its 1977 propositions and theses on marriage forecast this clash and by revisiting the "consent — copula" controversy and Pope Alexander III's compromise resolution, Alesandro offers a way forward using the history of consummation theory and an expanded notion of it as the key.

The *Relatio Synodi* from 2014 (n.48) stated "the role which faith plays in persons who marry could possibly be examined in ascertaining the validity of the Sacrament of Marriage, all the while maintaining that the marriage of two baptized Christians is always a sacrament." Alesandro proposes that an expanded understanding of consummation would enable this possibility.

In Part Two, Alesandro examines the need for streamlining canonical procedures and proffers seventeen suggestions for doing so. The first six concern substantial laws which, he argues, hinder theological development. His solution is to remove clauses, phrases and even whole paragraphs (e.g. c.1055 §2) from the canons as they are locked on to a contractual rather than covenantal

understanding of marriage. The other eleven suggestions are mostly now law due to the revision by the motu proprio *Mitis Iudex Dominus Iesus*.

Whether we marvel at his predictive powers in foreseeing this or argue that we all saw those changes coming, it is nevertheless Alesandro's clear explanation and reasoning for his position that make his work noteworthy. It is a concise yet taxative treatment and an essential starting point for anyone wanting to research the significance for validity of personal faith for those entering a sacramental marriage.

Very Reverend Tony KERIN

OUVRAGES REÇUS À LA RÉDACTION — BOOKS RECEIVED

BRAIDA, Pier Virginio Aimone, *Le Finanze del Papa*, Quaderni di Ius Missionale 8, Rome, Urbaniana University Press, 2016, 287 p. — ISBN 978-88-401-4078-0 — € 22,00

DANIEL, William L., *The Art of Good Governance: A Guide to the Administrative procedure for Just Decision-Making in the Catholic Church*, Gratianus Series, Montréal, Wilson and Lafleur, 2015, xvi, 275 p. — ISBN 978-2-89689-302-7 — CA\$ 36.95

DELGADO GALINDO, Miguel, *Charismes, mouvements ecclésiaux et associations de fidèles*, Gratianus Series, Montréal, Wilson and Lafleur, 2014, xxviii, 100 p. — ISBN 978-2-89689-153-3 — CA\$ 24.95

DEL POZZO, Massimo, *Il processo matrimoniale più breve davanti al vescovo*, Subsidia canonica 19, Rome, Pontificia Università della Santa Croce, Facoltà di Diritto canonico, 2016, 220 p. — ISBN 978-88-8333-557-0 — € 25,00

FINZEL, Helmut, *Die Bischofssynode. Zwischen päpstlichem Primat und bischöflicher Kollegialität*, Kanonistische Reihe, Band 027, Ottilien, Editions Sankt Ottilien Verlag, 2016, 126 p. — ISBN 978-3-8306-7791-8 — € 19,95

FERG, Günter, *Ihr seid gesandt. Rechtsgestalt und Charisma der Kongregation der "Armen Schulschwestern von Unserer Lieben Frau." Eine ordensrechtsgeschichtliche Untersuchung*, Münchener theologische Studien, Kanonistische Abteilung, Band 69, Ottilien, Editions Sankt Ottilien Verlag, 2016, 509 p. — ISBN 978-3-8306-7798-7 — € 58,00

JAMIN, Jürgen, *La cooperazione dei cardinali alle decisioni pontificie ratione fidei: Il pensiero di Enrico da Susa (Ostiense)*, Facoltà di Diritto Canonico San Pio X, Tesi Diritto Canonico 1, Venice, Marcianum Press, 2015, 269 p. — ISBN 978-88-6512-403-1 — € 21,00

- KAPFELSPERGER, Toni, *Staatsleistungen an die Katholische Kirche in Bayern*, Münchener theologischen fakultät, III. Kanonistische Abteilung, Band 70, Ottilien, Editions Sankt Ottilien Verlag, 2016, 265 p. — ISBN 978-3-8306-7775-8 — € 39,95
- LARSON, Atria A., *Gratian's Tractatus de Penitentia: A New Latin Edition with English Translation*, Studies in Medieval and Early Modern Canon Law 14, Washington, D.C., The Catholic University of America Press, 2016, xlviii, 311 p. — ISBN 978-0-813-22867-9 — US\$ 69.95
- McKENNA, Kevin E., *For the Defense: The Work of Some Nineteenth Century American Canonists in the Protection of Rights*, Gratianus Series, Montréal, Wilson and Lafleur, 2014, xiv, 196 p. — ISBN 978-2-89689-070-5 — CA\$ 29.95
- WACHS, Justin M., *Obsequium in the Church: Sacred Tradition, Second Vatican Council, 1983 Code, and Sacred Liturgy*, Gratianus Series, Montréal, Wilson and Lafleur, 2014, xxiv, 256 p. — ISBN 978-2-89689-161-0 — CA\$ 34.95
- WEI, John C., *Gratian the Theologian*, Studies in Medieval and Early Modern Canon Law, 13, Washington, D.C., The Catholic University of America Press, 2016, xviii, 353 p. — ISBN 978-0-8132-2803-7 — US\$ 65.00

NOTES BIOGRAPHIQUES BIOGRAPHICAL NOTES

ABBASS, Jobe

Born in Sydney, NS, on 27 January 1952. Member of the Conventual Franciscans' Immaculate Conception Province (USA), was ordained to the priesthood in Albany, NY on 25 May 1985. University studies: Carleton University, Ottawa, ON (B.A., 1972); Dalhousie University, Halifax, NS (LL.B., 1975); St. Anthony-on-Hudson Theologate, Rensselaer, NY (M.Div., 1985); Pontifical Oriental Institute, Rome (Licentiate in Canon Law, 1989 and Doctorate in Canon Law, 1992). Admitted to the Bar of NS on 14 November 1975 and practised as sole practitioner in Sydney, NS, 1975-1979. Attorney-at-law in the State of New York, was admitted to the New York Bar on 24 January, 1984. Professor of the faculty of canon law, Pontifical Oriental Institute, Rome, 1992-2004. Full, tenured professor on the faculty of canon law of St. Paul University, Ottawa, 2004-present.

ACOTCHOU, Gisèle, s.f.f.p.p.

Sœur Gisèle Acotchou est née le 26 septembre 1961 à Grand-Popo (Bénin, Afrique de l'Ouest). Elle suit ses études d'enseignement primaire et secondaire à Cotonou (Bénin) et à Lomé (Togo), de 1968 à 1982. Elle entre chez les Moniales bénédictines le 26 septembre 1982. Après ses vœux perpétuels, elle est dispensée de la vie monastique pour embrasser la vie franciscaine dans l'Institut des Sœurs Franciscaines Filles de Padre Pio (s.f.f.p.p.). Elle fait ses études pour l'équivalence du baccalauréat à l'Université Lumière Lyon 2 (France), de 1994-1995 et obtient le Diplôme d'Accès aux Études Universitaires (D.A.E.U.). Elle étudie ensuite la théologie, de 1995-1998, à l'Université Catholique de Lyon (France) où elle obtient le diplôme de licence en théologie (baccalauréat canonique) en 1998. Plus tard, de 2005 à 2008, elle poursuit les études de droit canonique à l'Université Catholique de l'Afrique de l'Ouest (U.C.A.O. à Abidjan en Côte d'Ivoire), et devient titulaire d'un diplôme de maîtrise en droit canonique. Le 7 octobre 2008, elle est élue Assistante générale de la Supérieure générale de l'Institut des Sœurs Franciscaines Filles de Padre Pio, fonction qui ne l'empêche pas de venir au

Canada le 13 septembre 2009, pour décrocher son doctorat en droit canonique à l'Université Saint-Paul d'Ottawa, après la thèse soutenue le 8 octobre 2013, dont le thème est le suivant : « Les relations canoniques des évêques diocésains et des instituts religieux de droit diocésain : la juste autonomie (cc. 578 et 586) avec une application particulière à l'Église au Bénin ». Une fois revenue dans son pays après son doctorat, elle est chargée d'administrer le cours du droit de la vie consacrée dans son institut et d'être la responsable des religieuses étudiantes de plusieurs nationalités au Togo.

BAUER, Nancy, O.S.B.

Sister of Saint Benedict of Saint Benedict's Monastery, St. Joseph, Minnesota. B.A. (photojournalism), University of Minnesota-Minneapolis; M.A. (theology, specialization in monastic studies), St. John's University School of Theology, Collegeville, Minnesota; J.C.D., The Catholic University of America, Washington, D.C. Diocese of St. Cloud, reporter/photographer, then editor of the diocesan newspaper, 1978-1989; vice-chancellor, 2003-2005. Prioress of Sisters of Saint Benedict, St. Joseph, Minnesota, 2005-2011. Assistant professor of canon law, School of Canon Law, The Catholic University of America, 2014-present.

DANIEL, William L.

He is an Assistant Professor in the School of Canon Law at The Catholic University of America in Washington, D.C., U.S.A. (2015-present). Previously he held the offices of Defender of the Bond and then Judge, as well as Vice-Chancellor, in the Diocese of Winona, Minnesota (U.S.A.). He earned the J.C.L. in 2006 and the J.C.D. in 2015 from Saint Paul University (Ottawa, Ontario). He has published numerous scholarly articles in various canonical journals, especially in the area of canonical procedural law, as well as unofficial English translations of decisions of the Roman Rota and of the Apostolic Signatura. He and his wife have been blessed with five children.

GALLARO, George Demetrio

Bishop Gallaro was born January 16, 1948 in Pozzallo, Sicily. He studied canon law at the Pontifical Oriental Institute and the Pontifical University of St. Thomas Aquinas. He was ordained a priest May 27, 1972 for the Eparchy of Newton. He served in his eparchy as chancellor, judicial vicar, rector of St. Gregory Seminary, director of the diaconate program, and coordinator of continuing education for clergy. He then served the Archeparchy of Pittsburgh as synchellus for canonical services, judicial vicar, and member of the formation team at Ss. Cyril and Methodius Seminary in Pittsburgh. He was ordained eparchial bishop on June 28, 2015.

LABRÈCHE, Chantal M.

Née à Ottawa, ON, Canada. En 1993, elle a obtenu un baccalauréat en communication de l'Université d'Ottawa avant de poursuivre ses études à l'Université Saint-Paul où elle a obtenu son baccalauréat en théologie (1996). Après avoir travaillé de nombreuses années au secrétariat de la paroisse Notre-Dame de Lourdes (Vanier) et à la chancellerie de l'Archidiocèse d'Ottawa en tant que secrétaire-notaire, elle a obtenu sa licence (2010) et son doctorat (2015) en droit canonique de l'Université Saint-Paul. De janvier 2010 à décembre 2012, elle a travaillé comme assistante à la rédaction pour la revue *Studia canonica*. Elle a donné une présentation lors des 49^e et 50^e Congrès annuels de la Société canadienne de droit canonique (2014/2015). Depuis septembre 2015, elle est professeure à la Faculté de droit canonique de l'Université Saint-Paul.

LORUSSO, Lorenzo

Father Lorusso was born in March 25, 1967 in Bari, Italy, and entered the Dominicans in 1989. He was ordained a priest in 1995. He has been a consultor to the Pontifical Council of Legislative Texts since 2008 and to the Congregation for the Oriental Churches since 2014. He becomes the Rector of the Basilica of St Nicholas in Bari in 2012. He obtained the licentiate in canon law from the Institut Catholique de Toulouse in 1995. He holds a doctorate in oriental canon law from the Pontifical Oriental Institute, Rome, in 1999 where he is a lecturer.

MARTENS, Kurt

Né en 1973 à Tielt, en Belgique, il fit des études en droit (licence en droit, 1996) à la Faculté de droit de la *Katholieke Universiteit Leuven*, Leuven, Belgique, et en droit canonique (J.C.L. 1997, J.C.D. 2004) à la Faculté de droit canonique de la même Université. Il fut collaborateur scientifique à la Faculté de droit canonique de la *Katholieke Universiteit Leuven* (1997-2005), professeur invité à l'Institut de droit canonique de l'Université Marc Bloch, Strasbourg, France (2002-2003), professeur invité à la Faculté de théologie de l'Université de Nimègue au Pays-Bas (2004-2005), et professeur invité à la Faculté de droit canonique de l'Université Saint-Paul, Ottawa, Canada (2005). Depuis 2005, il fut d'abord Assistant Professor (2005-2009), puis Associate Professor (2009-2015) et enfin Ordinary Professor (depuis 2015) à la School of Canon Law, The Catholic University of America, Washington, D.C. (USA). Depuis 2012, il est l'éditeur du périodique *The Jurist*.

MICHOWICZ, Przem Przemysław, OFM Conv.

Père Michowicz est né le 5 janvier 1981, à Jasło en Pologne. Il est membre de l'Ordre des Frères mineurs conventuels de la Province polonaise de

Cracovie. Il fut ordonné à la prêtrise le 27 Septembre 2008. Il poursuit son séminaire d'étude au *Studium Generale* de Cracovie, et à la Faculté Pontificale de Théologie « Saint-Bonaventure », à Rome. Il a été décerné un doctorat *utroque iure* en 2013 de l'Université Pontificale du Latran à Rome, après avoir soutenu sa thèse sur les problèmes de procédure dans le processus administratif pour le licenciement des instituts religieux, comme on le voit dans le canon 696. Ses recherches scientifiques s'intéressent principalement au droit canonique pour les religieux, le droit canonique administratif, et le droit comparé. Un certain nombre de ses articles et de recensions de livres touchant à ces domaines ont été publiés dans plusieurs revues juridiques polonaises et internationales telles que *Studia canonica*, *Commentarium pro religiosis*, *Prawo kanoniczne* et *Annals of Juridical Sciences*. Il est actuellement professeur de droit canonique et de droit ecclésiastique au Wyższe Seminarium Duchowne Franciszkanów, le séminaire franciscain de Cracovie, et membre de la Commission internationale pour la révision des constitutions.

PAPROCKI, Thomas John

Bishop Thomas John Paprocki was ordained a priest for the Archdiocese of Chicago in 1978. After ordination, he studied law at DePaul University College of Law and was admitted to the Illinois Bar in 1981. Working as a parish priest in South Chicago, then-Father Paprocki co founded the South Chicago Legal Clinic to help answer the need for legal services for the poor. In 2014 Bishop Paprocki was named President Emeritus and Of Counsel of the organization, now called the Chicago Legal Clinic. In November 1985, Cardinal Joseph Bernardin appointed Father Paprocki vice chancellor of the Archdiocese of Chicago and in 1987 sent him to do post graduate studies in canon law at the Pontifical Gregorian University in Rome. He completed his doctoral degree in 1991. Father Paprocki then returned to his previous position in Chicago as vice chancellor and was appointed chancellor in March 1992, serving in that capacity under Cardinal Bernardin and then under Cardinal Francis George, following Cardinal Bernardin's death in 1996. Concluding his service as Chancellor after two terms in office in June 2000, he was appointed pastor of St. Constance Parish. Pope John Paul II appointed him to serve as auxiliary bishop of Chicago on January 24, 2003. Cardinal George named him Liaison for Health and Hospital Affairs in the Archdiocese of Chicago. He currently serves as vice-president of the Illinois Catholic Health Association. He is a member of the USCCB Committee on Canonical Affairs and Church Governance. On 22 June 2010, Bishop Paprocki was installed the ninth Bishop of the Diocese of Springfield in Illinois. In May 2013 he received his Master of Business Administration (M.B.A.) degree from the University of Notre Dame.

Bishop Paprocki is Adjunct Professor of Law at Loyola University Chicago School of Law and Notre Dame Law School.

RENKEN, John A.

Monsignor Renken, P.H., was born in Carlinville, Illinois on January 18, 1953. He holds a B.A. in Philosophy (Cardinal Glennon College, Saint Louis, 1975); M.A. in Civil Law (University of Illinois, Springfield, 1988); S.T.D. in Dogmatic Theology (Pontifical University of Saint Thomas Aquinas, Rome) and J.C.D. (Pontifical University of Saint Thomas Aquinas, Rome, 1981). He was ordained a priest by Saint John Paul II on 24 June 1979. He served in multiple positions in the Diocese of Springfield in Illinois: parochial vicar, co-pastor, priest-moderator, vice-chancellor, chancellor, episcopal vicar and moderator for canonical affairs, vicar general, moderator of the curia, judicial vicar, director of the permanent diaconate. He was president of the CLSA (1999-2000); chair of the committee for the 1999 CLSA translation of the CIC; advisor to the USCCB Committee on Canonical Affairs (2003-2005); visiting professor of canon law in the summer JCL program at The Catholic University of America (1989-2006). He has lectured widely and his articles appear in many canonical journals. In 2007, he joined the Faculty of Canon Law, Saint Paul University, Ottawa, where he is now Dean and full professor.

SZUROMI, Sz. Anzelm, O.Praem

Fr. Anzelm Sz. Szuromi O.Praem is born in Budapest, Hungary (Europe), 31 October 1972. University studies: Pázmány Péter Catholic University (PPCU), Budapest (J.C.D., 1999; Dr. Habil., 2002; S.Th.D., 2006). Associate professor of canon law (2000-2006); full professor (since 2006) at the Canon Law Institute “ad instar facultatis” (PPCU, Budapest); Head of the Constitutional Law Department of the same institute (since 2002) and the Canon Law Department of the Faculty of Theology of PPCU (since 2009). President of the Canon Law Institute “ad instar facultatis” of PPCU (since 2006). Vice-President of PPCU (2007-2011). Doctor of the Hungarian Academy of Sciences (DSc. of Jurisprudence and Political Sciences, 2010). President of PPCU (since 2011). Chairman of the Hungarian Canon Law Association (since 2006). Chairman of the International Canon Law History Center, Budapest (since 2013). Editor of *Folia Theologica* and *Canonica* (since 2013). Member of the *Academia Europaea*, London (since 2015). Dr.h.c. at the Armenian State Pedagogical University after Khachatur Abovyan, Yerevan (2016).